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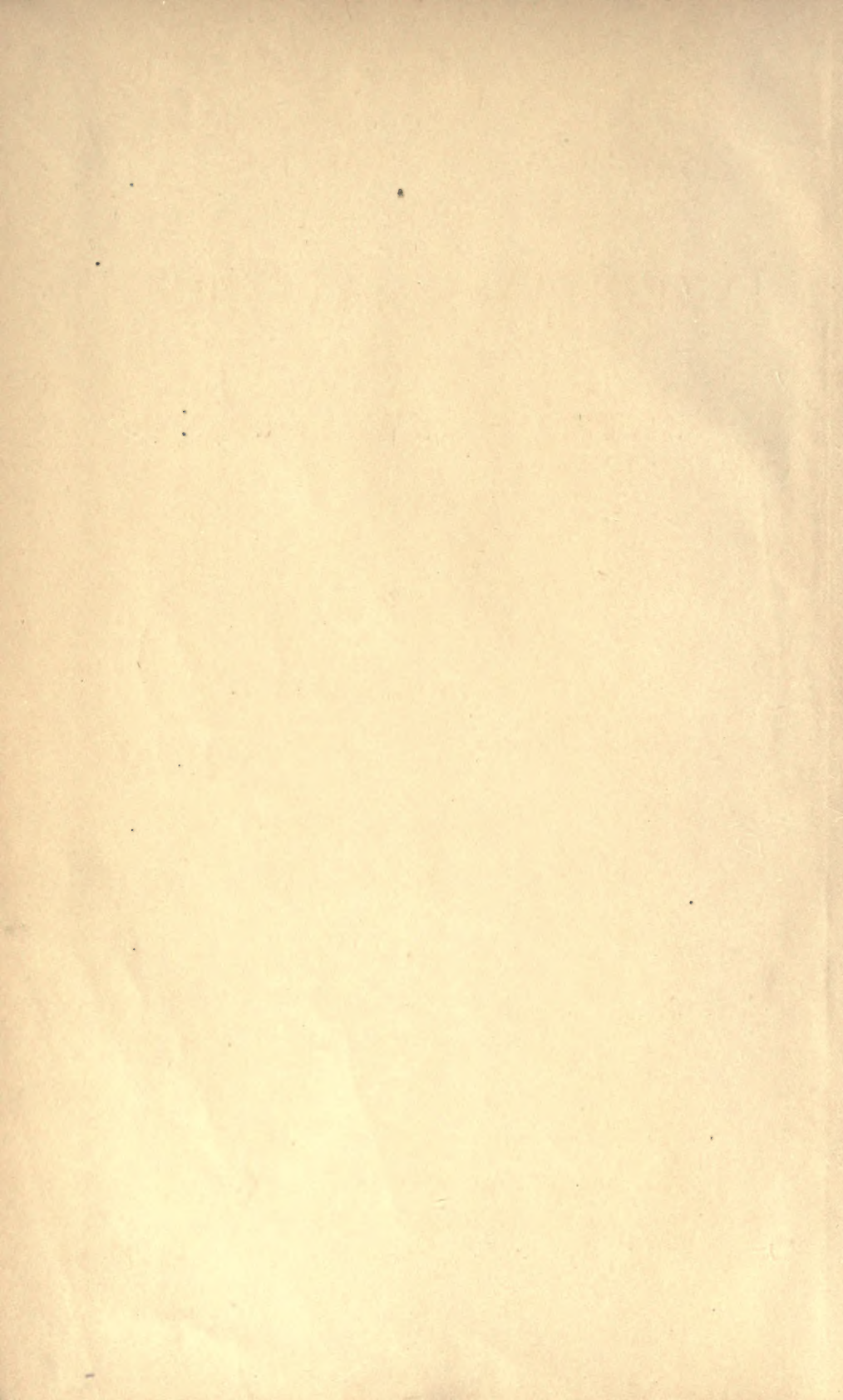
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THE LAW AND PRACTICE
OF
INHERITANCE TAXATION
IN THE
STATE OF NEW YORK

BY
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PREFACE

The chapters on Procedure have been so arranged as to enable the practitioner to follow in sequence the necessary steps to be taken, the subject of non-resident estates being contained in a separate chapter to obviate the confusion which might otherwise arise by an attempt to treat together resident and non-resident estates. They are designed to anticipate and answer the questions usually asked by the practitioner who is not thoroughly familiar with transfer tax procedure. As most of the questions of practice are dealt with and determined in the unreported adjudications of the surrogates, their opinions have been quoted from wherever possible.

The note at the end of each section of the present statute shows the last amendment thereof, and reference to the prior statutes, arranged chronologically, makes accessible the exact phraseology of the section before its amendment. This feature, taken in conjunction with the chronological arrangement of the annotated Court of Appeals decisions, and the separation of the discussion of cases applicable to the present law from those dealing with the prior statutes, tends to clarity. The rights of the parties being governed by the statute in force at the time of the transfer (*Matter of Agnew*, N. Y. Law Journal, December 13, 1913, *post*, page 53, and cases cited, page 54), the reader is at once enabled to know whether he should consult the text dealing with the law as it exists to-day, or with the prior statute in existence at the time his particular transfer was made.

The second section of the book contains all the Court of Appeals decisions, page 159, the exact wording of portions of the opinion being set forth in many cases, thus, in most instances, avoiding the necessity of quoting from the opinion when reference is made to the case. These

decisions have been fully annotated, and, it will be noted, include those in which there has been no opinion in the reports, recourse being had, in such instances, to the printed papers on appeal. Some of the cases so digested are of general importance, as for illustration, *Matter of Potter*, 199 N. Y. 561, *post*, page 371; *Matter of Rees*, 208 N. Y. 590, *post*, page 392; *Matter of Scott*, 208 N. Y. 602, *post*, page 396; *Matter of Schwarz*, 209 N. Y. mem., *post*, page 399.

Not infrequently the Court of Appeals confines itself to certain phases of the case, and closes by affirming the lower court. At times the portion of the decision affirmed, but not specifically referred to, is important, and for that reason there has been included in such cases a reference to the opinion of the lower court.

By the discussion of the subjects topically and the alphabetical arrangement, page 582, has been avoided the use of the conventional index, usually so unsatisfactory when one is not sufficiently familiar with the subject to know under just which index line his particular point is to be found. I have felt that the reader could best be served by the method employed in this book, which, with its liberal cross references, places at his command the law and practice in a readily accessible form.

While the compendium serves the purpose of an index, it has the additional object of leading the practitioner to the general topic, and then, by means of subordinate headings, guiding him to the exact point he has in mind. Thus, in the more important subjects, there will be found in alphabetical order appropriate chapters, as, for instance, *Appeal*, page 590; *Closely Held Stock*, page 612; *Good-Will*, page 706; *Power of Appointment*, page 768; *Remainders*, page 817; *Trust Deed*, page 867; *Vacating Decree*, page 878.

During the progress of this work I count myself fortunate in having had, from time to time, the benefit of discussions with Mr. Anthony J. Barrett, Mr. Thomas A. S. Beattie and Mr. Samuel Riker, Jr., of the New York bar, and Mr. Charles E. Haydock. They also have been good

enough to read portions of the proof, and I take this opportunity of expressing my appreciation.

To Mr. Francis K. Raynor of my office was assigned the duty of assisting in the proof reading and the preparation of the table of cases, a no small labor; he has been assiduous in its successful performance.

T. LUDLOW CHRYSTIE

New York City, January 2, 1914.



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INHERITANCE TAXATION

THE STATUTE

- (a) Article 10 of the Tax Law.
 - (b) Established new system of taxation for this state.
 - (c) Property subject to inheritance tax even though not taxable under general tax law.
 - (d) Inheritance tax is of ancient origin.
 - (e) First New York statute that of 1885.
 - (f) Amendments.
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- Section 220. Taxable transfers.
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 - 240. Reports of county treasurer.
 - 241. Report of state comptroller; payment of taxes; refunds in certain cases.
 - 242. Application of taxes.
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 - 244. Exemptions in article one not applicable.
 - 245. Limitation of time.

(a) Article 10 of the Tax Law

The statute of taxable transfers, commonly known as the inheritance tax statute, is article 10 of the Tax Law,

§§ 220 to 245, Consolidated Laws, volume V, pages 4118-4135, as amended.

(b) Established new tax system for this state

"The taxable transfer law has no reference or relation to the general law. The two acts are not *in pari materia*. While the object of both is to raise revenue for the support of the government, they have nothing else in common. * * * It proceeds upon a new theory of the right of the government to tax and establishes a new system of taxation. It taxes the right of succession to property, and measures the tax in the method specifically prescribed. * * *

(c) Property subject to inheritance tax even though not taxable under general tax law

"Many kinds of property might be enumerated which are not assessable under the general law, but which are appraisable under the collateral inheritance act." Matter of Knoedler, 140 N. Y. 377-380; Matter of Hellman, 174 N. Y. 254-257; Matter of Althause, 63 App. Div. 252-254, affirmed, without opinion, 168 N. Y. 670; Matter of Merriam, 141 N. Y. 479, sustained in 163 U. S. 625 *sub nom.* United States *v.* Perkins; Matter of Plummer, 30 Misc. 19, affirmed, without opinion, 161 N. Y. 631, and sustained in 178 U. S. 115 *sub nom.* Plummer *v.* Coler; Matter of Hamilton, 148 N. Y. 310; *etiam*, § 244.

(d) Inheritance tax is of ancient origin

"Taxes upon legacies and inheritances have been approved generally by writers upon political economy and systems of taxation, and no tax can be less burdensome and interfere less with the productive and industrial agencies of society. Such taxes were imposed in Rome two thousand years ago." Matter of McPherson, 104 N. Y. 306-316.

(e) First New York statute that of 1885

The statute, originally known as the Collateral Inheritance Tax, was passed on June 10, 1885, as chapter 483

of the laws of that year and took effect twenty days later. Matter of Howe, 112 N. Y. 100.

(f) Amendments

The tax was, in the beginning, a tax only on transfers to certain collaterals and strangers, *post*, page 404, but by Laws 1891, chapter 215, in effect April 20, 1891 (Matter of Dreyfous, 18 N. Y. Supp. 767), it was extended to transfers of personal property to lineals and certain near relatives who had theretofore been exempt, and it was again enlarged on March 16, 1903 (Laws 1903, chapter 41) to include transfers of real estate to lineals and near relatives.

Since 1885 the act has been amended over forty times. It is frequently necessary to know the exact phraseology of some repealed statute as the old statutes have a life extending beyond their repeal. Matter of Sloane, 154 N. Y. 109-113; Matter of Webber, 151 App. Div. 539; Matter of Ely, 157 App. Div. 658; Matter of Atterbury, N. Y. Law Journal, March 25, 1913, *post*, page 871; Matter of Agnew, *id.*, December 13, 1913, *post*, page 53.

They may be likened to a table of logarithms, quite unnecessary to be carried in the memory, but indispensable if the transfer be made prior to the present statute.

At the end of each section of the present statute the time when the last amendment was made is noted. For wording of the section prior to the last amendment consult the former statutes arranged chronologically, *post*, page 403.

(g) The present statute

The present statute is as follows:

§ 220. Taxable transfers

A tax shall be and is hereby imposed upon the transfer of any tangible property within the state and of intangible property, or of any interest therein or income therefrom, in trust or otherwise, to persons or corporations in the following cases, subject to the exemptions and limitations hereinafter prescribed:

1. When the transfer is by will or by the intestate laws

of this state of any intangible property, or of tangible property within the state, from any person dying seized or possessed thereof while a resident of the state.

2. When the transfer is by will or intestate law, of tangible property within the state, and the decedent was a nonresident of the state at the time of his death.

3. Whenever the property of a resident decedent, or the property of a nonresident decedent within this state, transferred by will is not specifically bequeathed or devised, such property shall, for the purposes of this article, be deemed to be transferred proportionately to and divided *pro rata* among all the general legatees and devisees named in said decedent's will, including all transfers under a residuary clause of such will.

4. When the transfer is of intangible property, or of tangible property within the state, made by a resident, or of tangible property within the state made by a nonresident, by deed, grant, bargain, sale or gift made in contemplation of the death of the grantor, vendor or donor or intended to take effect in possession or enjoyment at or after such death.

5. When any such person or corporation becomes beneficially entitled, in possession or expectancy, to any property or the income thereof by any such transfer whether made before or after the passage of this chapter.

6. Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property made either before or after the passage of this chapter, such appointment when made shall be deemed a transfer taxable under the provisions of this chapter in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will.

7. The tax imposed hereby shall be upon the clear market value of such property, at the rates hereinafter prescribed. (*Laws 1909, chap. 62, post, page 501, as amended by Laws 1910, chap. 706, post, page 520; and by Laws 1911, chap. 732, post, page 526, in effect July 21, 1911.*)

§ 221. Exceptions and limitations

Any property devised or bequeathed for religious ceremonies, observances or commemorative services of or for the deceased donor, or to any person who is a bishop or to any religious, educational, charitable, missionary, benevolent, hospital or infirmary corporation, wherever incorporated, including corporations organized exclusively for bible or tract purposes and corporations organized for the enforcement of laws relating to children or animals, shall be exempted from and not subject to the provisions of this article. There shall also be exempted from and not subject to the provisions of this article personal property other than money or securities bequeathed to a corporation or association wherever incorporated or located, organized exclusively for the moral or mental improvement of men or women or for scientific, literary, library, patriotic, cemetery or historical purposes or for two or more of such purposes and used exclusively for carrying out one or more of such purposes. But no such corporation or association shall be entitled to such exemption if any officer, member or employee thereof shall receive or may be lawfully entitled to receive any pecuniary profit from the operations thereof except reasonable compensation for services in effecting one or more of such purposes or as proper beneficiaries of its strictly charitable purposes; or if the organization thereof for any such avowed purpose be a guise or pretense for directly or indirectly making any other pecuniary profit for such corporation or association or for any of its members or employees or if it be not in good faith organized or conducted exclusively for one or more of such purposes. (*Laws 1909, chap. 62, post, page 502, as amended by Laws 1910, chap. 600, post, page 519; and by Laws 1910, chap. 706, post, page 520; and by Laws 1911, chap. 732, post, page 527; and by Laws 1912, chap. 206, post, page 42; and by Laws 1913, chap. 356; and by Laws 1913, chap. 795, in effect June 17, 1913, post, page 43.*)

§ 221a. Rates of tax

1. Upon a transfer taxable under this article of property

or any beneficial interest therein, of an amount in excess of the value of five thousand dollars to any father, mother, husband, wife, child, brother, sister, wife or widow of a son, or the husband of a daughter, or any child or children adopted as such in conformity with the laws of this state, of the decedent, grantor, donor, or vendor, or to any child to whom any such decedent, grantor, donor, or vendor for not less than ten years prior to such transfer stood in the mutually acknowledged relation of a parent, provided, however, such relationship began at or before the child's fifteenth birthday and was continuous for said ten years thereafter, or to any lineal descendant of such decedent, grantor, donor, or vendor born in lawful wedlock, the tax on such transfer shall be at the rate of

One per centum on any amount in excess of five thousand dollars up to the sum of fifty thousand dollars.

Two per centum on any amount in excess of fifty thousand dollars up to the sum of two hundred and fifty thousand dollars.

Three per centum on any amount in excess of two hundred and fifty thousand dollars up to the sum of one million dollars.

Four per centum on any amount in excess of one million dollars.

2. Upon a transfer taxable under this article of property or any beneficial interest therein of an amount in excess of the value of one thousand dollars to any person or corporation other than those enumerated in paragraph one of this section, the tax shall be at the rate of

Five per centum on any amount in excess of one thousand dollars up to the sum of fifty thousand dollars.

Six per centum on any amount in excess of fifty thousand dollars up to the sum of two hundred and fifty thousand dollars.

Seven per centum on any amount in excess of two hundred and fifty thousand dollars up to the sum of one million dollars.

Eight per centum on any amount in excess of one million

dollars. (*Added by Laws 1911, chap. 732, in effect July 21, 1911.*)

§ 221b. Exemption of certain personal property

A transfer of pictures, statuary, works of art, antiques, books, manuscripts or other similar personal property shall be exempted from and not subject to the provisions of this article, if within two years after such transfer the person to whom such transfer is made shall present the same to the state, or to a municipal corporation of the state for educational, scientific, literary, library, or historical purposes; and if the tax thereon shall have been theretofore paid the amount thereof shall be refunded in accordance with the provisions of this article. (*Added by Laws 1913, chap. 639, in effect May 23, 1913.*)

§ 222. Accrual and payment of tax

All taxes imposed by this article shall be due and payable at the time of the transfer, except as herein otherwise provided. Taxes upon the transfer of any estate, property or interest therein limited, conditioned, dependent or determinable upon the happening of any contingency or future event by reason of which the fair market value thereof cannot be ascertained at the time of the transfer as herein provided, shall accrue and become due and payable when the persons or corporations beneficially entitled thereto shall come into actual possession or enjoyment thereof. Such tax shall be paid to the state comptroller in a county in which the office of appraiser is salaried, and in other counties, to the county treasurer, and said state comptroller or county treasurer shall give, and every executor, administrator or trustee shall take, duplicate receipts from him of such payment as provided in section two hundred and thirty-six. (*Laws 1905, chap. 368, post, page 477, in effect June 1, 1905.*)

§ 223. Discount and interest

If such tax is paid within six months from the accrual thereof, a discount of five per centum shall be allowed and deducted therefrom. If such tax is not paid within eight-

een months from the accrual thereof, interest shall be charged and collected thereon at the rate of ten per centum per annum from the time the tax accrued; unless by reason of claims made upon the estate, necessary litigation or other unavoidable cause of delay, such tax cannot be determined and paid as herein provided, in which case interest at the rate of six per centum per annum shall be charged upon such tax from the accrual thereof until the cause of such delay is removed, after which ten per centum shall be charged. (*Laws 1896, chap. 908, post, page 439, as amended by Laws 1905, chap. 368, post, page 478, in effect June 1, 1905.*)

§ 224. Lien of tax and collection by executors, administrators and trustees

Every such tax shall be and remain a lien upon the property transferred until paid and the person to whom the property is so transferred, and the executors, administrators and trustees of every estate so transferred shall be personally liable for such tax until its payment. Every executor, administrator or trustee shall have full power to sell so much of the property of the decedent as will enable him to pay such tax in the same manner as he might be entitled by law to do for the payment of the debts of the testator or intestate. Any such executor, administrator or trustee having in charge or in trust any legacy or property for distribution subject to such tax shall deduct the tax therefrom and shall pay over the same to the state comptroller or county treasurer, as herein provided. If such legacy or property be not in money, he shall collect the tax thereon upon the appraised value thereof from the person entitled thereto. He shall not deliver or be compelled to deliver any specific legacy or property subject to tax under this article to any person until he shall have collected the tax thereon. If any such legacy shall be charged upon or payable out of real property, the heir or devisee shall deduct such tax therefrom and pay it to the executor, administrator or trustee, and the tax shall remain a lien or charge on such real property

until paid; and the payment thereof shall be enforced by the executor, administrator or trustee in the same manner that payment of the legacy might be enforced, or by the district attorney under section two hundred and thirty-five of this chapter. If any such legacy shall be given in money to any such person for a limited period, the executor, administrator or trustee shall retain the tax upon the whole amount, but if it be not in money, he shall make application to the court having jurisdiction of an accounting by him, to make an apportionment, if the case require it, of the sum to be paid into his hands by such legatees, and for such further order relative thereto as the case may require. (*Laws 1905, chap. 368, post, page 478, in effect June 1, 1905.*)

§ 225. Refund of tax erroneously paid

If any debts shall be proven against the estate of a decedent after the payment of any legacy or distributive share thereof, from which any such tax has been deducted or upon which it has been paid by the person entitled to such legacy or distributive share, and such person is required by order of the surrogate having jurisdiction, on notice to the state comptroller, to refund the amount of such debts or any part thereof, an equitable proportion of the tax shall be repaid to him by the executor, administrator or trustee, if the tax has not been paid to the state comptroller or county treasurer; or if such tax has been paid to such state comptroller or county treasurer, such officer shall refund out of the funds in his hands or custody to the credit of such taxes such equitable proportion of the tax, and credit himself with the same in the account required to be rendered by him under this article. If after the payment of any tax in pursuance of an order fixing such tax, made by the surrogate having jurisdiction, such order be modified or reversed by the surrogate having jurisdiction within two years from and after the date of entry of the order fixing the tax, or be modified or reversed at any time on an appeal taken therefrom within the time allowed by law on due notice to the state comptroller, the

state comptroller shall, if such tax was paid in a county in which the office of appraiser is salaried, refund to the executor, administrator, trustee, person or persons by whom such tax was paid, the amount of any moneys paid or deposited on account of such tax in excess of the amount of the tax fixed by the order modified or reversed, out of the funds in his hands or custody to the credit of such taxes, and to credit himself with the same in the account required to be rendered by him under this article, or if paid in a county in which the office of appraiser is not salaried, he shall by warrant direct and allow the county treasurer of the county to refund such amount in the same manner; but no application for such refund shall be made after one year from such reversal or modification, unless an appeal shall be taken therefrom, in which case no such application shall be made after one year from the final determination on such appeal or of an appeal taken therefrom, and the representatives of the estate, legatees, devisees or distributees entitled to any refund under this section shall not be entitled to any interest upon such refund, and the state comptroller shall deduct from the fees allowed by this article to the county treasurer the amount theretofore allowed him upon such overpayment. Where it shall be proved to the satisfaction of the surrogate that deductions for debts were allowed upon the appraisal, since proved to have been erroneously allowed, it shall be lawful for such surrogate to enter an order assessing the tax upon the amount wrongfully or erroneously deducted. This section, as amended, shall apply to appeals and proceedings now pending and taxes heretofore paid in relation to which the period of one year from such reversal or modification has not expired when this section, as amended, takes effect. (*Laws 1909, chap. 62, post, page 504, amended by Laws 1911, chap. 308, post, page 524, in effect June 12, 1911.*)

§ 226. Taxes upon devises and bequests in lieu of commissions

If a testator bequeaths or devises property to one or

more executors or trustees in lieu of their commissions or allowances, or makes them his legatees to an amount exceeding the commissions or allowances prescribed by law for an executor or trustee, the excess in value of the property so bequeathed or devised above the amount of commissions or allowances prescribed by law in similar cases shall be taxable under this article. (*Laws 1892, chap. 399, section 8, post, page 428, in effect May 1, 1892.*)

§ 227. Liability of certain corporations to tax

If a foreign executor, administrator or trustee shall assign or transfer any stock or obligations in this state standing in the name of a decedent, or in trust for a decedent, liable to any such tax, the tax shall be paid to the state comptroller or the treasurer of the proper county on the transfer thereof. No safe deposit company, trust company, corporation, bank or other institution, person or persons having in possession or under control securities, deposits, or other assets belonging to or standing in the name of a decedent who was a resident or non-resident, or belonging to, or standing in the joint names of such a decedent and one or more persons, including the shares of the capital stock of, or other interests in, the safe deposit company, trust company, corporation, bank or other institution making the delivery or transfer herein provided, shall deliver or transfer the same to the executors, administrators or legal representatives of said decedent, or to the survivor or survivors when held in the joint names of a decedent and one or more persons, or upon their order or request, unless notice of the time and place of such intended delivery or transfer be served upon the state comptroller at least ten days prior to said delivery or transfer; nor shall any such safe deposit company, trust company, corporation, bank or other institution, person or persons deliver or transfer any securities, deposits or other assets belonging to or standing in the name of a decedent, or belonging to, or standing in the joint names of a decedent and one or more persons, including the shares of the capital stock of, or other interests in, the safe

deposit company, trust company, corporation, bank or other institution making the delivery or transfer, without retaining a sufficient portion or amount thereof to pay any tax and interest which may thereafter be assessed on account of the delivery or transfer of such securities, deposits or other assets, including the shares of the capital stock of, or other interests in, the safe deposit company, trust company, corporation, bank or other institution making the delivery or transfer, under the provisions of this article, unless the state comptroller consents thereto in writing. And it shall be lawful for the said state comptroller, personally or by representative, to examine said securities, deposits or assets at the time of such delivery or transfer. Failure to serve such notice or failure to allow such examination or failure to retain a sufficient portion or amount to pay such tax and interest as herein provided shall render said safe deposit company, trust company, corporation, bank or other institution, person or persons liable to the payment of the amount of the tax and interest due or thereafter to become due upon said securities, deposits or other assets, including the shares of the capital stock of, or other interests in, the safe deposit company, trust company, corporation, bank or other institution making the delivery or transfer, and in addition thereto, a penalty of not less than five or more than twenty-five thousand dollars; and the payment of such tax and interest thereon, or of the penalty above prescribed, or both, may be enforced in an action brought by the state comptroller in any court of competent jurisdiction. (*Laws 1905, chap. 368, post, page 480, amended by Laws 1908, chap. 310, post, page 496, in effect May 18, 1908.*)

§ 228. Jurisdiction of the surrogate

The surrogate's court of every county of the state having jurisdiction to grant letters testamentary or of administration upon the estate of a decedent whose property is chargeable with any tax under this article, or to appoint a trustee of such estate or any part thereof,

or to give ancillary letters thereon, shall have jurisdiction to hear and determine all questions arising under the provisions of this article, and to do any act in relation thereto authorized by law to be done by a surrogate in other matters or proceedings coming within his jurisdiction; and if two or more surrogates' courts shall be entitled to exercise any such jurisdiction, the surrogate first acquiring jurisdiction hereunder shall retain the same to the exclusion of every other surrogate. Every petition for ancillary letters testamentary or ancillary letters of administration made in pursuance of the provisions of article seven, title three, chapter eighteen of the code of civil procedure shall set forth the name of the state comptroller as a person to be cited as therein prescribed, and a true and correct statement of all the decedent's property in this state and the value thereof; and upon the presentation thereof the surrogate shall issue a citation directed to the state comptroller; and upon the return of the citation the surrogate shall determine the amount of the tax which may be or become due under the provisions of this article and his decree awarding the letters may contain any provision for the payment of such tax or the giving of security therefor which might be made by such surrogate if the state comptroller were a creditor of the decedent. (*Laws 1905, chap. 368, post, page 481, in effect June 1, 1905.*)

§ 229. Appointment of appraisers, stenographers and clerks

The state comptroller shall appoint and may at pleasure remove not to exceed six persons in the county of New York, four persons in the counties of Kings and Bronx, and one person in the counties of Albany, Dutchess, Erie, Monroe, Nassau, Niagara, Oneida, Onondaga, Orange, Queens, Rensselaer, Richmond, Suffolk and Westchester, to act as appraisers therein. The state comptroller, from time to time and whenever in his opinion it is necessary, may also appoint and at pleasure remove not to exceed two additional persons to act as transfer tax appraisers

in the county of New York, to whom shall be referred the appraisal of delinquent estates pending before the transfer tax appraisers in New York county, where more than eighteen months have elapsed since the death of such decedents, respectively, and also to act as appraiser of other estates whenever it shall appear to the comptroller that the services of such additional appraiser is necessary. The appraiser so appointed shall receive an annual salary to be fixed by the state comptroller, together with their actual and necessary traveling expenses and witness fees, as hereinafter provided, payable monthly by the state comptroller out of any funds in his hands or custody on account of transfer tax. The salaries of each of the appraisers so appointed shall not exceed the following amounts: In New York county, four thousand dollars; in Kings and Bronx counties, four thousand dollars; in Albany, Erie, Queens and Westchester counties, three thousand dollars; in Nassau, Orange and Rensselaer counties, two thousand dollars; in Monroe, Oneida and Onondaga counties, one thousand five hundred dollars; in Dutchess, Niagara, Richmond and Suffolk counties, one thousand dollars. Each of the said appraisers shall file with the state comptroller his oath of office and his official bond in the penal sum of not less than one thousand dollars, in the discretion of the state comptroller, conditioned for the faithful performance of his duties as such appraiser, which bond shall be approved by the attorney-general and the state comptroller. The state comptroller shall retain out of any funds in his hands on account of said tax the following amounts: First, a sum sufficient to provide the appraisers of New York county with one managing clerk, at a salary not to exceed four thousand dollars a year, whose duties shall be prescribed by the state comptroller, nine stenographers, three clerks, one examiner of values, and one assistant examiner of values, whose salaries shall not exceed two thousand dollars a year each, and one junior clerk, whose salary shall not exceed six hundred dollars a year; the appraisers of Kings and Bronx counties, with four stenographers, whose salaries shall not exceed two thou-

sand dollars a year each, one clerk, whose salary shall not exceed seven hundred and twenty dollars a year; one page, whose salary shall not exceed four hundred and eighty dollars a year, and the appraiser of Erie county with one clerk, whose salary shall not exceed fifteen hundred dollars a year, and the appraiser of Westchester county with one clerk, whose salary shall not exceed the sum of twelve hundred dollars a year, and the appraiser of Queens county with one clerk, whose salary shall not exceed the sum of twelve hundred dollars a year, and the appraiser of Oneida county with one stenographer, whose salary shall not exceed the sum of nine hundred dollars a year, such employees to be appointed by the state comptroller. The state comptroller shall also retain out of any funds in his hands on account of said tax a sum sufficient to provide each of the additional transfer tax appraisers in New York county, whenever appointed as hereinbefore provided, with a stenographer, whose salary shall not exceed the rate of two thousand dollars a year each, such employees to be appointed by the state comptroller. Second, a sum to be used in defraying the expenses for office rent, stationery, postage, process serving and other similar expenses necessarily incurred in the appraisal of estates, not exceeding fifteen thousand dollars a year in New York county and five thousand dollars a year in Kings, and Bronx counties. (*Laws 1909, chap. 62, as amended by Laws 1909, chap. 283, post, page 507; and by Laws 1910, chap. 706, post, page 523; and by Laws 1911, chap. 803, and by Laws 1912, chap. 214, and by Laws 1913, chap. 366, in effect April 24, 1913.*)

§ 230. Proceedings by appraiser

In each county in which the office of appraiser is not salaried the county treasurer shall act as appraiser. The surrogate, either upon his own motion, or upon the application of any interested person, including the state comptroller, shall by order direct the person or one of the persons appointed pursuant to section two hundred and twenty-nine of this article in counties in which the office

of appraiser is salaried, and in other counties, the county treasurer, to fix the fair market value of property of persons whose estates shall be subject to the payment of any tax imposed by this article.

Every such appraiser shall forthwith give notice by mail to all persons known to have a claim or interest in the property to be appraised, including the state comptroller, and to such persons as the surrogate may by order direct, of the time and place when he will appraise such property. He shall at such time and place appraise the same at its fair market value as herein prescribed; and for that purpose the said appraiser is authorized to issue subpoenas and to compel the attendance of witnesses before him and to take the evidence of such witnesses under oath concerning such property and the value thereof; and he shall make report thereof and of such value in writing, to the said surrogate, together with the depositions of the witnesses examined, and such other facts in relation thereto and to said matter as the surrogate may order or require. Every appraiser, except in the counties in which the office of appraiser is salaried, for which provision is hereinbefore made, shall be paid by the state comptroller and after the audit of said state comptroller, his actual and necessary traveling expenses and the fees paid such witnesses, which fees shall be the same as those now paid to witnesses subpoenaed to attend in courts of record, payment to be made out of funds in the hands of the county treasurer of the proper county on account of the tax imposed under the provisions of this article.

The value of every future or limited estate, income, interest or annuity dependent upon any life or lives in being, shall be determined by the rule, method and standard of mortality and value employed by the superintendent of insurance in ascertaining the value of policies of life insurance and annuities for the determination of liabilities of life insurance companies, except that the rate of interest for making such computation shall be five per centum per annum.

In estimating the value of any estate or interest in property, to the beneficial enjoyment or possession whereof there are persons or corporations presently entitled thereto, no allowance shall be made on account of any contingent incumbrance thereon, nor on account of any contingency upon the happening of which the estate or property or some part thereof or interest therein might be abridged, defeated or diminished; provided, however, that in the event of such incumbrance taking effect as an actual burden upon the interest of the beneficiary, or in the event of the abridgment, defeat or diminution of said estate or property or interest therein as aforesaid, a return shall be made to the person properly entitled thereto of a proportionate amount of such tax on account of the incumbrance when taking effect, or so much as will reduce the same to the amount which would have been assessed on account of the actual duration or extent of the estate or interest enjoyed. Such return of tax shall be made in the manner provided by section two hundred and twenty-five of this article.

Where any property shall, after the passage of this chapter, be transferred subject to any charge, estate or interest, determinable by the death of any person, or at any period ascertainable only by reference to death, the increase accruing to any person or corporation upon the extinction or determination of such charge, estate or interest, shall be deemed a transfer of property taxable under the provisions of this article in the same manner as though the person or corporation beneficially entitled thereto had then acquired such increase from the person from whom the title to their respective estates or interests is derived.

When property is transferred in trust or otherwise, and the rights, interest or estates of the transferees are dependent upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended or abridged, a tax shall be imposed upon said transfer at the highest rate which, on the happening of any of the said contingencies or conditions, would be possible under the

provisions of this article, and such tax so imposed shall be due and payable forthwith by the executors or trustees out of the property transferred, and the surrogate shall enter a temporary order determining the amount of said tax in accordance with this provision; provided, however, that on the happening of any contingency whereby the said property, or any part thereof, is transferred to a person or corporation exempt from taxation under the provisions of this article, or to any person taxable at a rate less than the rate imposed and paid, such person or corporation shall be entitled to a return of so much of the tax imposed and paid as is the difference between the amount paid and the amount which said person or corporation should pay under the provisions of this article; and the executor or trustee of each estate, or the legal representative having charge of the trust fund, shall immediately upon the happening of said contingencies or conditions apply to the surrogate of the proper county, upon a verified petition setting forth all the facts, and giving at least ten days' notice by mail to all interested persons or corporations, for an order modifying the temporary taxing order of said surrogate so as to provide for the final assessment and determination of the tax in accordance with the ultimate transfer or devolution of said property. Such return of overpayment shall be made in the manner provided by section two hundred and twenty-five of this article.

Estates in expectancy which are contingent or defeasible and in which proceedings for the determination of the tax have not been taken or where the taxation thereof has been held in abeyance, shall be appraised at their full, undiminished value when the persons entitled thereto shall come into the beneficial enjoyment or possession thereof, without diminution for or on account of any valuation theretofore made of the particular estates for purposes of taxation, upon which said estates in expectancy may have been limited.

Where an estate for life or for years can be divested by the act or omission of the legatee or devisee it shall be

taxed as if there were no possibility of such divesting.

The report of the appraiser shall be made in duplicate, one of which duplicates shall be filed in the office of the surrogate and the other in the office of the state comptroller. (*Laws 1909, chap. 62, post, page 508, as amended by Laws 1911, chap. 800, post, page 529, in effect July 28, 1911.*)

§ 231. Determination of surrogate

From such report of appraisal and other proof relating to any such estate before the surrogate, the surrogate shall forthwith, as of course, determine the cash value of all estates and the amount of tax to which the same are liable; or the surrogate may so determine the cash value of all such estates and the amount of tax to which the same are liable, without appointing an appraiser.

The superintendent of insurance shall, on the application of any surrogate, determine the value of any such future or contingent estates, income or interest therein limited, contingent, dependent or determinable upon the life or lives of persons in being, upon the facts contained in any such appraiser's report, and certify the same to the surrogate, and his certificate shall be conclusive evidence that the method of computation adopted therein is correct.

The surrogate shall immediately give notice, upon the determination by him as to the value of any estate which is taxable under this article, and of the tax to which it is liable, to all persons known to be interested therein, and shall immediately forward a copy of such taxing order to the state comptroller. The surrogate shall also forward to the state comptroller copies of all orders entered by him in relation to or affecting in any way the transfer tax on any estate, including orders of exemption.

If, however, it appear at any stage of the proceedings that any of such persons known to be interested in the estate is an infant or an incompetent, the surrogate may, if the interest of such infant or incompetent is presently involved and is adverse to that of any of the other persons interested therein, appoint a special guardian of such

infant; but nothing in this provision shall affect the right of an infant over fourteen years of age or of anyone on behalf of an infant under fourteen years of age to nominate and apply for the appointment of a special guardian for such infant at any stage of the proceedings. (*Laws 1905, chap. 365, post, page 486, in effect June 1, 1905.*)

§ 232. Appeal and other proceedings

The state comptroller or any person dissatisfied with the appraisement or assessment and determination of tax may appeal therefrom to the surrogate within sixty days from the fixing, assessing and determination of tax by the surrogate as herein provided, upon filing in the office of the surrogate a written notice of appeal, which shall state the grounds upon which the appeal is taken; but no costs shall be allowed by the surrogate on such appeal.

Within two years after the entry of an order or decree of a surrogate determining the value of an estate and assessing the tax thereon, the state comptroller may, if he believes that such appraisal, assessment or determination has been fraudulently, collusively or erroneously made, make application to a justice of the supreme court of the judicial district embracing the surrogate's court in which the order or decree has been filed, for a reappraisal thereof. The justice to whom such application is made may thereupon appoint a competent person to reappraise such estate. Such appraiser shall possess the powers and be subject to the duties of an appraiser under section two hundred and thirty and shall receive compensation at the rate of five dollars per day for every day actually and necessarily employed in such appraisal. Such compensation shall be payable by the state comptroller or county treasurer out of any funds he may have on account of any tax imposed under the provisions of this article, upon the certificate of the justice appointing him. The report of such appraiser shall be filed with the justice by whom he was appointed, and thereafter the same proceedings shall be taken and had by and before such justice as are herein provided to be taken and had by and before the surro-

gate. The determination and assessment of such justice shall supersede the determination and assessment of the surrogate, and shall be filed by such justice in the office of the state comptroller, and a certified copy thereof transmitted to the surrogate's court of the proper county. (*Laws 1908, chap. 310, post, page 497, in effect May 18, 1908.*)

§ 233. Composition of transfer tax upon certain estates

The state comptroller, by and with the consent of the attorney-general expressed in writing, is hereby empowered and authorized to enter into an agreement with the trustees of any estate in which remainders or expectant estates have been of such a nature, or so disposed and circumstanced, that the taxes therein were held not presently payable, or where the interests of the legatees or devisees were not ascertainable under the provisions of chapter four hundred and eighty-three of the laws of eighteen hundred and eighty-five; chapter three hundred and ninety-nine of the laws of eighteen hundred and ninety-two, or chapter nine hundred and eight of the laws of eighteen hundred and ninety-six, and the several acts amendatory thereof and supplemental thereto; and to compound such taxes upon such terms as may be deemed equitable and expedient; and to grant discharge to said trustees upon the payment of the taxes provided for in such composition, provided, however, that no such composition shall be conclusive in favor of said trustees as against the interest of such cestuis que trust as may possess either present rights of enjoyment, or fixed, absolute or indefeasible rights of future enjoyment, or of such as would possess such rights in the event of the immediate termination of particular estates, unless they consent thereto, either personally, when competent, or by guardian or committee. Composition or settlement made or effected under the provisions of this section shall be executed in triplicate, and one copy filed in the office of the state comptroller, one copy in the office of the surrogate of the county in which the tax was paid, and one

copy delivered to the executors, administrators or trustees who shall be parties thereto. (*Laws 1905, chap. 368, in effect June 1, 1905.*)

§ 234. Surrogate's assistants in New York, Kings and other counties

The state comptroller may, upon the recommendation of the surrogate, appoint, and may at pleasure remove, assistants and clerks in the surrogates' offices of the following counties, at annual salaries to be fixed by him not to exceed the amounts hereinafter specified:

1. In New York county, a transfer tax assistant, five thousand dollars; a transfer tax clerk, two thousand four hundred dollars; an assistant clerk, eighteen hundred dollars; a recording clerk, thirteen hundred dollars; a stenographer, twelve hundred dollars; and shall be entitled to expend not more than seven hundred and fifty dollars a year in such office for expenses necessarily incurred in the assessment and collection of taxes under this article.

2. In Kings county, a transfer tax assistant, four thousand dollars; a transfer tax clerk, two thousand dollars; an assistant clerk, fifteen hundred dollars; and shall be entitled to expend not more than five hundred dollars a year for expenses necessarily incurred in the assessment and collection of taxes under this article.

3. In Erie county, a transfer tax clerk, eighteen hundred dollars.

4. In Westchester county, a transfer tax assistant, two thousand five hundred dollars.

5. In Albany county, a transfer tax clerk, fifteen hundred dollars.

6. In Queens county, a transfer tax clerk, fifteen hundred dollars.

7. In Onondaga county, a transfer tax clerk, twelve hundred dollars.

8. In Monroe county, two transfer tax clerks, one thousand dollars each; and shall be entitled to expend not more than two hundred dollars a year for expenses neces-

sarily incurred in the assessment and collection of taxes under this article.

9. In Dutchess county, a transfer tax clerk, nine hundred dollars.

10. In Oneida county, not more than two transfer tax clerks, twelve hundred dollars in the aggregate.

11. In Suffolk county, a transfer tax clerk, one thousand dollars.

12. In Ulster county, a transfer tax clerk, seven hundred and twenty dollars.

13. In Richmond county, a transfer tax clerk, one thousand dollars.

14. In Nassau county, a transfer tax clerk, twelve hundred dollars.

Such salaries and expenses shall be paid monthly by the state comptroller, upon proper vouchers, out of any funds in his hands on account of taxes collected under this article. (*Laws 1909, chap. 62, post, page 513, as amended by Laws 1910, chap. 70; Laws 1911, chaps. 160, 681 and 744; Laws 1912, chap. 45; Laws 1913, chap. 429.*)

§ 235. Proceedings by district attorneys

If, after the expiration of eighteen months from the accrual of any tax under this article, such tax shall remain due and unpaid, after the refusal or neglect of the persons liable therefor to pay the same, the state comptroller shall notify the district attorney of the county, in writing, of such failure or neglect, and such district attorney shall apply to the surrogate's court for a citation, citing the persons liable to pay such tax to appear before the court on the day specified, not more than three months after the date of such citation, and show cause why the tax should not be paid. The surrogate, upon such application, and whenever it shall appear to him that any such tax accruing under this article has not been paid as required by law, shall issue such citation, and the service of such citation, and the time, manner and proof thereof, and the hearing and determination thereon and the enforcement of the determination or order made by the

surrogate shall conform to the provisions of the code of civil procedure for the service of citations out of the surrogate's court, and the hearing and determination thereon and its enforcement so far as the same may be applicable. The surrogate or his clerk shall, upon request of the district attorney or the state comptroller, furnish, without fee, one or more transcripts of such decree, which shall be docketed and filed by the county clerk of any county of the state without fee, in the same manner and with the same effect as provided by law for filing and docketing transcripts of decrees of the surrogate's court. The costs awarded by any such decree after the collection and payment of the tax to the state comptroller or county treasurer may be retained by the district attorney for his own use. Such costs shall be fixed by the surrogate in his discretion, but shall not exceed in any case where there has not been a contest, the sum of one hundred dollars, or where there has been a contest, the sum of two hundred and fifty dollars. Whenever the surrogate shall certify that there was probable cause for issuing a citation and taking the proceedings specified in this section, the state comptroller, after the same shall have been audited by him, shall pay all expenses incurred for the service of citations and other lawful disbursements not otherwise paid, from funds in his hands on account of such tax, or in a county in which the office of appraiser is not salaried, by a warrant upon the county treasurer of such county for the payment by him of the same from funds in his hands on account of such tax. In proceedings to which the state comptroller is cited as a party under sections two hundred and twenty-eight and two hundred and thirty of this article, he is authorized to designate and retain counsel to represent him and to pay the expenses thereby incurred out of the funds which may be in his hands on account of this tax in any case in a county where the office of appraiser is salaried, and in any other county the state comptroller shall by warrant direct the county treasurer to pay such expenses out of any funds which may be in his hands on account of this tax; provided, how-

ever, that in the collection of taxes upon estates of non-resident decedents the state comptroller shall not allow for legal services up to and including the entry of the order of the surrogate fixing the tax a sum exceeding ten per centum of the taxes and penalties collected. (*Laws 1905, chap. 368, post, page 489, in effect June 1, 1905.*)

§ 236. Receipts from county treasurer or comptroller

One of the duplicate receipts issued for the payment of any tax under this article, as provided by section two hundred and twenty-two, shall be countersigned by the state treasurer if the same was issued by the state comptroller, and by the state comptroller if issued by any county treasurer. The officer so countersigning the same shall charge the officer receiving the tax with the amount thereof and affix the seal of his office to the same and return to the proper person; but no executor, administrator or trustee shall be entitled to a final accounting of an estate in settlement of which a tax is due under the provisions of this article unless he shall produce a receipt so sealed and countersigned, or a certified copy thereof. Any person shall, upon the payment of fifty cents to the officer issuing such receipt, be entitled to a duplicate thereof, to be signed, sealed and countersigned in the same manner as the original.

Any person shall, upon the payment of fifty cents, be entitled to a certificate of the state comptroller that the tax upon the transfer of any real estate of which any decedent died seized has been paid, such certificate to designate the real property upon which such tax is paid, the name of the person so paying the same, and whether in full of such tax. Such certificate may be recorded in the office of the county clerk or register of the county where such real property is situate, in a book to be kept by him for that purpose, which shall be labeled "transfer tax." (*Laws 1905, chap. 368.*)

§ 237. Fees of county treasurer

The treasurer of each county in which the office of

appraiser is not salaried shall be allowed to retain, on all taxes paid and accounted for by him each fiscal year under this article, five per centum on the first fifty thousand dollars, two and one-half per centum on the next fifty thousand dollars, and one per centum on all additional sums. Such fees shall be in addition to the salaries and fees now allowed by law to such officers. (*Laws 1908, chap. 310, post, page 499, in effect May 18, 1908.*)

§ 238. Books and forms to be furnished by the state comptroller

The state comptroller shall furnish to each surrogate a book, which shall be a public record, and in which he shall enter the name of every decedent upon whose estate an application to him has been made for the issue of letters of administration, or letters testamentary, or ancillary letters, the date and place of death of such decedent, the estimated value of his real and personal property, the names, places of residence and relationship to him of his heirs-at-law, the names and places of residence of the legatees and devisees in any will of any such decedent, the amount of each legacy and the estimated value of any real property devised therein, and to whom devised. These entries shall be made from the data contained in the papers filed on any such application, or in any proceeding relating to the estate of the decedent. The surrogate shall also enter in such book the amount of the personal property of any such decedent, as shown by the inventory thereof when made and filed in his office, and the returns made by any appraiser appointed by him under this article, and the value of annuities, life estates, terms of years, and other property of any such decedent or given by him in his will or otherwise, as fixed by the surrogate, and the tax assessed thereon, and the amounts of any receipts for payment of any tax on the estate of such decedent under this article filed with him. The state comptroller shall also furnish to each surrogate forms for the reports to be made by such surrogate, which shall correspond with the entries to be made in such book.

(*Laws 1892, chap. 399, section 18, post, page 434, in effect May 1, 1892.*)

§ 239. Reports of surrogate and county clerk

Each surrogate shall, on January, April, July and October first of each year, make a report, upon the forms furnished by the comptroller containing all the data and matters required to be entered in such book, which shall be immediately forwarded to the state comptroller. The county clerk of each county, except in the counties where the registers perform the duties of the county clerk with respect to the recording of deeds, and when in such counties the registers shall, at the same times, make reports containing a statement of any deed or other conveyance filed or recorded in his office, of any property, which appears to have been made or intended to take effect in possession or enjoyment after the death of the grantor or vendor, with the name and place of residence of such grantor or vendor, the name and place of residence of the grantee or vendee, and a description of the property transferred, which shall be immediately forwarded to the state comptroller. (*Laws 1905, chap. 368.*)

§ 240. Reports of county treasurer

Each county treasurer in a county in which the office of appraiser is not salaried shall make a report, under oath, to the state comptroller, on January, April, July and October first of each year, of all taxes received by him under this article, stating for what estate and by whom and when paid. The form of such report may be prescribed by the state comptroller. He shall, at the same time, pay the state treasurer all taxes received by him under this article and not previously paid into the state treasury, except as provided in the next section, and for all such taxes collected by him and not paid into the state treasury within thirty days from the times herein required, he shall pay interest at the rate of ten per centum per annum. (*Laws 1901, chap. 173, post, page 470, as amended by Laws 1911, chap. 800, in effect July 28, 1911.*)

§ 241. Report of state comptroller, payment of taxes; refunds in certain cases

The state comptroller shall deposit all taxes collected by him under this article, except as hereinafter otherwise provided, in a responsible bank, banking house or trust company in the city of Albany, which shall pay the highest rate of interest to the state for such deposit, to the credit of the state comptroller on account of the transfer tax. And every such bank, banking house or trust company shall execute and file in his office an undertaking to the state, in the sum, and with such sureties, as are required and approved by the comptroller, for the safe keeping and prompt payment on legal demand therefor of all such moneys held by or on deposit in such bank, banking house or trust company, with interest thereon on daily balances at such rate as the comptroller may fix. Every such undertaking shall have indorsed thereon, or annexed thereto, the approval of the attorney-general as to its form. The state comptroller shall on the first day of each month make a verified return to the state treasurer of all taxes received by him under this article, stating for what estate, and by whom and when paid; and shall credit himself with all expenditures made since his last previous return on account of such taxes, for salary, refunds or other purposes lawfully chargeable thereto. He shall on or before the tenth day of each month pay to the state treasurer the balance of such taxes remaining in his hands at the close of business on the last day of the previous month, as appears from such returns. Whenever the tax on a contingent remainder has been determined at the highest rate which on the happening of any of said contingencies or conditions would be possible under the provisions of this article, the state comptroller, in the counties wherein this tax is payable direct to him, and in all other counties the treasurer of said counties, respectively, when such tax is paid shall retain and hold to the credit of said estate so much of the tax assessed upon such contingent remainders as represents the difference between the tax at the highest rate and the tax upon such re-

mainders which would be due if the contingencies or conditions had happened at the date of the appraisal of said estate, and the state comptroller or the county treasurer shall deposit the amount of tax so retained in some solvent trust company or trust companies or savings banks in this state, to the credit of such estate, paying the interest thereon when collected by him to the executor or trustee of said estate, to be applied by said executor or trustee as provided by the decedent's will. Upon the happening of the contingencies or conditions whereby the remainder ultimately vests in possession, if the remainder then passes to persons taxable at the highest rate, the state comptroller or the county treasurer shall turn over the amount so retained by him to the state treasurer as provided herein and by section two hundred and forty of this article, or if the remainder ultimately vests in persons taxable at a lower rate or a person or corporation exempt from taxation by the provisions of this article, the state comptroller or the county treasurer shall refund any excess of tax so held by him to the executor or trustee of the estate, to be disposed of by said executor or trustee as provided by the decedent's will. Executors or trustees of any estate may elect to assign to and deposit with the state comptroller or the county treasurer, bonds or other securities of the estate approved by the state comptroller, or the county treasurer, both as to the form of the collateral and the amount thereof, for the purpose of securing the payment of the difference between the tax on said remainder at the highest rate and the tax upon said remainder which would be due if the contingencies or conditions had happened at the date of the appraisal of said estate, and cash for the balance of said tax as assessed, which said bonds or other securities shall be held by the state comptroller, or the county treasurer, to the credit of said estate until the actual vesting of said remainders, the income therefrom when received by the state comptroller or the county treasurer to be paid over to the executor or trustee during the continuance of the trust estates and then to be finally disposed of in accordance

with the ultimate transfer or devolution of said remainders as hereinbefore provided; and it shall be the duty of the executors or trustees of such estates to forthwith notify the state comptroller of the actual vesting of all such contingent remainders.

If any executor or trustee shall have deposited with the state comptroller, or the county treasurer, cash or securities, or both cash and securities, to an amount in excess of the sum necessary to pay the transfer tax upon such contingent remainders at the highest rate as aforesaid, the excess of tax so deposited shall be returned to the executor or trustee, or if any executor or trustee shall have deposited with the state comptroller, or the county treasurer, cash or securities, or both cash and securities, to an amount less than is sufficient to pay the tax upon such contingent remainders as finally assessed and determined, the executor or trustee of said estate shall forthwith, upon the entry of the order determining the correct amount of tax due, pay to the state comptroller, or the county treasurer, whichever is entitled under the provisions of this article to receive the tax, the balance due on account of said tax. (*Laws 1909, chap. 62, post, page 518, amended by Laws 1911, chap. 800, post, page 532, in effect July 28, 1911.*)

§ 242. Application of taxes

All taxes levied and collected under this article when paid into the treasury of the state shall be applicable to the expenses of the state government and to such other purposes as the legislature shall by law direct. (*Laws 1901, chap. 173.*)

§ 243. Definitions

The words "estate" and "property," as used in this article, shall be taken to mean the property or interest therein passing or transferred to individual or corporate legatees, devisees, heirs, next of kin, grantees, donees or vendees, and not as the property or interest therein of the decedent, grantor, donor or vendor and shall include all property or interest therein, whether situated within or

without this state. The words "tangible property" as used in this article shall be taken to mean corporeal property such as real estate and goods, wares and merchandise, and shall not be taken to mean money, deposits in bank, shares of stock, bonds, notes, credits or evidences of an interest in property and evidences of debt. The words "intangible property" as used in this article shall be taken to mean incorporeal property, including money, deposits in bank, shares of stock, bonds, notes, credits, evidences of an interest in property and evidences of debt. The word "transfer," as used in this article, shall be taken to include the passing of property or any interest therein in the possession or enjoyment, present or future, by inheritance, descent, devise, bequest, grant, deed, bargain, sale or gift, in the manner herein prescribed. The words "county treasurer" and "district attorney," as used in this article, shall be taken to mean the treasurer or the district attorney of the county of the surrogate having jurisdiction as provided in section two hundred and twenty-eight of this article. The words "the intestate laws of this state," as used in this article, shall be taken to refer to all transfers of property, or any beneficial interest therein, effected by the statute of descent and distribution and the transfer of any property, or any beneficial interest therein, effected by operation of law upon the death of a person omitting to make a valid disposition thereof, including a husband's right as tenant by the curtesy or the right of a husband to succeed to the personal property of his wife who dies intestate leaving no descendants her surviving. (*Laws 1892, chap. 399, section 22, post, page 435, as amended by Laws 1898, chap. 88, and by Laws 1910, chap. 706, post, page 524; and by Laws 1911, chap. 732, post, page 528, in effect July 21, 1911.*)

§ 244. Exemptions in article one not applicable

The exemptions enumerated in section four of this chapter shall not be construed as being applicable in any manner to the provisions of this article. (*Added by Laws 1900, chap. 382, in effect April 11, 1900.*)

§ 245. Limitation of time

The provisions of the code of civil procedure relative to the limitation of time of enforcing a civil remedy shall not apply to any proceeding or action taken to levy, appraise, assess, determine or enforce the collection of any tax or penalty prescribed by this article, and this section shall be construed as having been in effect as of date of the original enactment of the inheritance tax law, provided, however, that as to real estate in the hands of bona fide purchasers, the transfer tax shall be presumed to be paid and cease to be a lien as against such purchasers after the expiration of six years from the date of accrual. (*Formerly § 282 of Tax Law, added to Tax Law by Laws 1899, chap. 737, in effect May 26, 1899; transferred to section 245 by Laws 1909, chap. 62, post, page 519.*)

THE TAXABLE TRANSFER

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| (1) The tax is on the transfer. | (5) "Intestate laws of this state" defined. |
| (2) Transfers in non-resident estates. | (6) Time of transfer. |
| (3) The statutory definition. | (7) Transfers by deed for a consideration. |
| (4) Transfers under subd. 4 of § 220. | |

(1) The tax is on the transfer

"This charge," said Justice Jenks in *Matter of Moses*, 138 App. Div. 525-526, "for convenience called a tax (*Matter of Hamilton*, 148 N. Y. 311), is upon the right of succession, not upon property, made on the theory that succession is a creation of the law. (*Matter of Dows*, 167 N. Y. 231.) It may be regarded as a tribute to government that establishes and maintains that right. Logically enough, it appears that this tax in Rome went into a peculiar treasury for the pay of the soldiery of Augustus."

Chief Justice Cullen defines it as "a tax not on property, but on succession; that is to say, a tax on the legatee for the privilege of succeeding to property." *Matter of Gihon*, 169 N. Y. 443-447. Justice Collin says the tax is imposed "upon the transfer of and not upon the property. * * * It is in the nature of an excise tax on the right to and method of transfer." *Matter of White*, 208 N. Y. 64-67.

At the outset it may be fair to the reader to quote the words of Justice Finch, words wrought in the furnace of experience. "I recall," he said, "that I have somewhere spoken of the danger of legal definitions because almost certain to prove incomplete and inaccurate." *Matter of Hoffman*, 143 N. Y. 327-332. No sooner does one grasp a definition of this tax as all-sufficient, than the elusiveness of a final definition becomes apparent.

(2) Transfers in non-resident estates

Non-resident estates are not taxed upon the same theory as resident estates, for as was said by Justice

Miller in *Matter of Tiffany*, 143 App. Div. 327-334: "The right of the State to impose transfer taxes on the entire estate of resident decedents and on the property within the State of non-resident decedents necessarily depends on inconsistent theories."

Justice Patterson in discussing transfers in estates of non-residents, said: "As to residents the transfer tax is on the succession; but as to non-residents it is a tax on the transfer of property within the jurisdiction of the court." *Matter of Bishop*, 82 App. Div. 112-115; *Matter of Kissel*, 65 Misc. 443, affirmed, without opinion, 142 App. Div. 934.

The subject of non-resident estates is treated *post*, page 133.

(3) The statutory definition

The statutory definition of a "transfer" is contained in the third sentence of § 243 which reads: "The word 'transfer' as used in this article, shall be taken to include the passing of property or any interest therein in the possession or enjoyment, present or future, by inheritance, descent, devise, bequest, grant, deed, bargain, sale or gift, in the manner herein prescribed."

The above words "in the manner herein prescribed" refer to § 220 which provides, in estates of residents, that a tax shall "be imposed upon the transfer of any tangible property within the state and of intangible property," when the property is transferred by (a) will, (b) intestate laws of this state, (c) deed, grant, bargain, sale or gift made either

(1) In contemplation of death, or

(2) Intended to take effect in possession or enjoyment at or after death.

If the transfer is effected in any other than one of the four ways above enumerated it is without the statute and is not subject to the tax.

As to the tax upon a transfer by the exercise of a power of appointment under the provisions of subdivision 6 of § 220 vide *post*, page 768.

(4) Transfers under subdivision 4 of § 220

There has been considerable litigation relative to that portion of the law which now appears under subdivision 4 of § 220. There seems to be in the minds of many a misunderstanding as to the provisions of this section, due because of their failure to appreciate that although there is but one sentence in this section it deals with two different cases. *Matter of Brandreth*, 169 N. Y. 437-441. A gift made in contemplation of death is, in the intendment of the statute, quite distinct from a gift intended to take effect in possession or enjoyment at or after death. A man on his death bed may give and deliver to his son securities of large value. Such a gift is clearly made by the father to the son in contemplation and expectation of his imminent dissolution, and the transfer is taxable.

THE WORDS "IN CONTEMPLATION OF THE DEATH" as used in subdivision 4 of § 220 are defined in *Matter of Baker*, 83 App. Div. 530, affirmed, on opinion below, in 178 N. Y. 575, the court saying at page 533, "the words 'in contemplation of the death,' do not refer to that general expectation which every mortal entertains, but rather the apprehension which arises from some existing condition of body or some impending peril." Vide etiam *Matter of Spaulding*, 49 App. Div. 541, affirmed, without opinion, 163 N. Y. 607; *Matter of Crary*, 31 Misc. 72-75; *Matter of Price*, 62 Misc. 149; *Matter of Mary Delaney*, N. Y. Law Journal, August 16, 1913, opinion quoted *post*, page 645; *Matter of Dee*, id., Dec. 6, 1913, *post*, page 645.

A GIFT INTENDED TO TAKE EFFECT in possession or enjoyment at or after death may be illustrated by the instance of a father in robust health, but mindful of the inevitable end, making a gift to his son of a large amount of property reserving to himself, however, a life interest in said property. This is not a gift made in contemplation of death although, of course, there is an element of contemplation of death in it but it is not what the statute means. This is the sort of gift which the courts have construed as one intended to take effect in possession or enjoyment at or after the death of the donor. *Matter of*

Green, 153 N. Y. 223; Matter of Masury, 28 App. Div. 580, affirmed, without opinion, 159 N. Y. 532; Matter of Bostwick, 160 N. Y. 489; Matter of Cornell, 170 N. Y. 423; Matter of Keeney, 194 N. Y. 281, sustained in 222 U. S. 525, *sub nom.* Keeney *v.* New York; Matter of Dobson, 73 Misc. 170; Matter of William C. Schermerhorn, N. Y. Law Journal, June 26, 1913, opinion quoted *post*, page 869; Matter of Newman Cowan, *id.*, July 24, 1913, opinion quoted *post*, page 699. Vide etiam Matter of Pitou, 79 Misc. 384; Matter of Halligan, 82 *id.* 30, and other cases cited sub Property Held in Trust or Jointly, *post*, page 787.

(5) "Intestate laws of this state" defined

It must be borne in mind that after the decisions in the cases of Matter of Starbuck, 63 Misc. 156 (1909), affirmed, 201 N. Y. 531, and Matter of Green, 144 App. Div. 232 (1911), the legislature broadened the meaning of the words "intestate laws of this state" by adding to the definitions contained in § 243 the following sentence: "The words 'the intestate laws of this state,' as used in this article, shall be taken to refer to all transfers of property, or any beneficial interest therein, effected by the statute of descent and distribution and the transfer of any property, or any beneficial interest therein, effected by operation of law upon the death of a person omitting to make a valid disposition thereof, including a husband's right as tenant by the curtesy or the right of a husband to succeed to the personal property of his wife who dies intestate leaving no descendants her surviving." Laws of 1911, chapter 732, in effect July 21, 1911.

The legislature in the foregoing amendment confined itself to a definition of the words "the intestate laws of this state" contained in subdivision 1 of § 220, and made no reference to the words of subdivision 2 which relate to the intestate law of other states and countries. The courts have not yet passed upon the question as to whether the said 1911 amendment to § 243 changes the rule of the Starbuck and Green cases, *supra*, so far as the estate of a non-resident intestate is concerned. The Starbuck

case held that a husband's right as tenant by the curtesy was not subject to the tax, and a like ruling was made in the Green case as to the right of a husband to succeed to the personal property of his wife who dies intestate leaving no descendants her surviving.

(6) Time of transfer

Where the transfer is by will or by the intestate laws the time of transfer is the death of the decedent. *Matter of Vassar*, 127 N. Y. 1-8; *Matter of Seamen*, 147 id. 69-74; *Matter of Davis*, 149 id. 539-547; *Matter of Smith*, 150 App. Div. 805-809.

The state by means of the inheritance tax "reaches out and appropriates for its use a portion of the property at the moment of its owner's decease; allowing only the balance to pass in the way directed by the testator, or permitted by its intestate law." *Matter of Swift*, 137 N. Y. 77-84.

As to transfers taxable under the provisions of subdivision 4 of § 220 *vide* *Matter of Atterbury*, N. Y. Law Journal, March 25, 1913, opinion quoted *post*, page 871; *Matter of Webber*, 151 App. Div. 539; *Matter of Keeney*, 194 N. Y. 281-287, sustained in 222 U. S. 525, sub nom. *Keeney v. New York*; *Matter of Dwight*, N. Y. Law Journal, October 8, 1911, (opinion quoted sub *Trust Deed post*, page 872), affirmed, without opinion, 149 App. Div. 912; *Matter of Agnew*, id., Dec. 13, 1913, *post*, page 53.

(7) Transfers by deed for a consideration

In *Matter of Keeney*, *supra*, Chief Justice Cullen in discussing the question of the taxability of a transfer by deed intended to take effect in possession and enjoyment at the death of the grantor (subdivision 4, § 220) uttered this dictum, page 286: "It may be also observed that if the statute is to be construed as applicable only to voluntary transfers or gifts, as to which we express no opinion. * * *" It will be observed that this dictum casts a doubt as to whether the statute is to be interpreted as embracing only transfers without a consideration. How-

ever, with the exception of transfers by will, an examination of the cases discloses that the courts have so far construed the statute as applicable only to voluntary transfers or gifts.

TRANSFERS BY WILL discussed in *Matter of Gould*, 156 N. Y. 423; *Matter of Kidd*, 188 N. Y. 274; etiam *Matter of Demers*, 41 Misc. 470; *Matter of Rogers*, 71 App. Div. 461-465, affirmed, on opinion below, 172 N. Y. 617; *Matter of Riemann*, 42 Misc. 648-650; *Matter of Edson*, 38 App. Div. 19, affirmed, on opinion below, 159 N. Y. 568.

"It is very evident that the word 'deed' as used in this act (present § 220, subd. 4) has no reference to conveyance of property by such an instrument made in the ordinary course of business for a valuable consideration, but is confined to conveyances of real property intended as gifts." *Matter of Birdsall*, 22 Misc. 180-193, affirmed, without opinion, 43 App. Div. 624.

In *Matter of Spaulding*, 49 App. Div. 541-546, affirmed, without opinion, 163 N. Y. 607, the court say: "If a person, fully realizing that his death is to occur within a few hours, should convey by deed real estate and receive the full consideration therefor, it would not be claimed that the real estate so conveyed would be subject to the tax in question, notwithstanding the conveyance was clearly made in contemplation of death. Or, if a person under such circumstances should transfer personal property in payment of a just debt, and with the avowed purpose of having the matter adjusted before his death, the statute would not apply, and yet the transaction would be within its provisions if literally construed." Vide etiam *Matter of Miller*, 77 App. Div. 473-480; *Matter of Dobson*, 73 Misc. 170-174.

Surrogate Brown, Monroe County, said in *Matter of Stebbins*, 52 Misc. 438-443: "The statute has no reference to transfers made upon a valuable consideration, but it relates merely to voluntary transfers without consideration; for the tax, as above stated, is not upon property but upon the right of succession."

In Matter of Heiser, N. Y. Law Journal, July 19, 1913, Surrogate Fowler said, "The transfer tax statute does not impose a tax upon a transfer of property which is made for a valuable consideration."

RATES OF TAX AND EXEMPTIONS

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| <ul style="list-style-type: none"> (1) Exemptions under § 221. (2) Extend to foreign corporations. (3) Personal property other than money or securities. (4) Exemption should be claimed at time of appraisal. (5) Amendments. (6) Section 221b added by Laws of 1913. (7) Graded rates of tax under § 221a. (8) Relationship of beneficiary. (9) Exercise of Power of Appointment. (10) Taxable amount passing to each beneficiary determines rate of tax. | <ul style="list-style-type: none"> (11) Beneficiaries divided into two classes by § 221a. (12) Subdivision 1 of § 221a. (13) Subdivision 2 of § 221a. (14) Method of computing tax. (15) Beneficiary enumerated in subdivision 1. (16) Beneficiary under subdivision 2. (17) Table showing rates of tax. (18) Order fixing tax. (19) Computation of tax. (20) When exemption prorated. (21) Non-resident estate. (22) Rates of tax under prior statutes. (23) Trust Deed. |
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The statutory provisions relative to exemptions and the rates of tax are contained in the three sections 221, 221a and 221b, *supra*, page 5.

(1) Exemptions under § 221

The exemptions granted by section 221 are of two classes. The first gives an absolute exemption of any property of whatsoever kind, including money, no matter of what amount, that may be devised or bequeathed for religious ceremonies, observances or commemorative services of or for the deceased donor

or to

any person who is a bishop
or to the following corporations

religious
charitable
benevolent
infirmary

educational
missionary
hospital

including

corporations organized
exclusively for Bible
or tract purposes

corporations organized
for the enforcement of
laws relating to chil-
dren or animals.

(2) **Extend to foreign corporations**

This exemption applies not only to New York corporations of the character indicated but also to corporations organized under the laws of other states, the law having been amended by chapter 732, Laws of 1911, in effect July 21, 1911, so as to include foreign corporations. A bishop who was a nonresident was entitled to the exemption even under the old law. *Matter of Palmer*, 33 App. Div. 307, affirmed, on opinion below, 158 N. Y. 669.

(3) **Personal property other than money or securities**

LIMITED EXEMPTIONS. The other class of exemptions is set forth in the second sentence of section 221, and extends only to bequests of "personal property other than money or securities." This restricted exemption is granted to a corporation or association organized exclusively for

the moral or mental improve-	scientific
ment of men or women	
literary	library
patriotic	cemetery
historical	

"purposes or for two or more of such purposes and used exclusively for carrying out one or more of such purposes." The exemption is given to corporations or associations of the character indicated wherever incorporated or located.

It should be borne in mind, however, that no such corporation or association shall be entitled to these exemptions "if any officer, member or employee thereof shall receive or may be lawfully entitled to receive any pecuniary profit from the operations thereof except reasonable compensation for services in effecting one or more of such purposes or as proper beneficiaries of its strictly charitable purposes; or if the organization thereof for any such avowed

purpose be a guise or pretense for directly or indirectly making any other pecuniary profit for such corporation or association or for any of its members or employees or if it be not in good faith organized or conducted exclusively for one or more of such purposes."

(4) Exemptions should be claimed at time of appraisal

Where there has been a legacy or a bequest which is entitled to the exemption under section 221 the exemption should be claimed by the beneficiary at the time of the appraisal of the estate by the transfer tax appraiser. *Matter of Townsend*, 153 App. Div. 85-86; *Matter of Neustadter*, N. Y. Law Journal, August 16, 1913. This claim should be made by affidavit setting forth the basis upon which the claim is made. For form of affidavit *vide post*, page 687.

(5) Amendments

The policy of the state of New York has steadily increased the scope of the exemptions granted under section 221. The statutory amendments and the decisions affecting exemptions and rates of tax are discussed, *post*, pages 685 and 808.

The present section 221a has been the law since July 21, 1911. Section 221 has been amended three times since that date. Laws, 1912, chapter 206; Laws, 1913, chapter 356, and Laws, 1913, chapter 795.

By the Laws of 1912, chapter 206, in effect April 8, 1912, corporations organized for the enforcement of laws relating to children or animals were transferred from the class entitled to the limited exemptions to the class entitled to the complete exemptions.

On April 24, 1913 (Laws of 1913, chapter 356), there was inserted in said section 221 the following provision:

"There shall also be exempted from and not subject to the provisions of this article bonds or other obligations issued by the state of New York, provided, however, that such bonds or other obligations are registered in the name of the decedent at the time of death, or in the name of one

or more persons or corporations in trust for such decedent at the time of such decedent's death."

Above provision was repealed on June 17, 1913 (Laws of 1913, chapter 795). In estates of persons who died while said provision was in force the transfers of bonds or other obligations issued by the state of New York are exempt from inheritance taxation, provided they were registered as therein required.

(6) Section 221b added by Laws of 1913

SECTION 221b provides that "A transfer of pictures, statuary, works of art, antiques, books, manuscripts or other similar personal property shall be exempted from and not subject to the provisions of this article, if within two years after such transfer the person to whom such transfer is made shall present the same to the state, or to a municipal corporation of the state for educational, scientific, literary, library, or historical purposes; and if the tax thereon shall have been theretofore paid the amount thereof shall be refunded in accordance with the provisions of this article." This provision is entirely new to the statute, having been added by chapter 639 of the Laws of 1913, in effect May 24, 1913.

(7) Graded rates of tax under § 221a

On July 11, 1910 (Laws of 1910, chapter 706, *post*, page 521) was put in effect for the first time in the state of New York the principle of graded rates of taxes, the rates ranging from one per cent to twenty-five per cent. This period, sometimes called the "Reign of Terror," lasted one year and ten days, coming to an end on July 21, 1911 (Laws of 1911, chapter 732) when the graded rates, although continued, were reduced so that in no case do they exceed eight per cent (section 221a)

(8) Relationship of beneficiary

The relationship of the beneficiary to the decedent and the value of the taxable property passing from the decedent to the beneficiary determine the rate of tax as well as the amount of the exemption.

ASSIGNMENT of gift by beneficiary does not change rate of tax. *Matter of Cook*, 187 N. Y. 253-260, *post*, page 336.

If the legatee or devisee "RENOUNCE THE GIFT and refuse to receive it, no tax can be collected with respect to him because there has been no transfer to him." *Matter of Wolfe*, 89 App. Div. 349, affirmed, without opinion, 179 N. Y. 599, *post*, page 297.

May renounce as to part of legacy. *Matter of Merritt*, 155 App. Div. 228-232.

(9) Exercise of power of Appointment

When there is a power of appointment the relationship of the beneficiary to the donee determines the rate of tax and exemption "in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will." *Matter of Rogers*, 71 App. Div. 461-465, affirmed, on opinion below, 172 N. Y. 617; *Isham v. N. Y. Association for the Poor*, 177 N. Y. 218; section 220, subdivision 6. The legislature has not provided for the possible difficulty in the case of two donees of the power, of different relationship to the appointee. *Matter of Walworth*, 66 App. Div. 171-175.

(10) Taxable amount passing to each beneficiary determines rate of tax

The value of the property of the decedent in the aggregate is not what determines the rate of tax but it is the taxable amount passing to each individual beneficiary. The reverse used to be the rule, the change having been made on July 11, 1910, by amendment to section 243 (Laws of 1910, chapter 706).

If a beneficiary receives property some of which is subject to the tax and some not, it is the transfer of the property subject to the tax which determines the rate. For instance, the value of the total property passing to a beneficiary amounts to one hundred thousand dollars, of which one half is real estate and goods, wares and merchandise

situated without the state and therefore not subject to the tax. §§ 220 and 243. The remaining half would determine the rate of tax, and the tax on the transfer would be on the basis of a transfer of the value of fifty thousand dollars and not on the basis of a transfer of one hundred thousand dollars.

(11) Beneficiaries divided into two classes by § 221a

Section 221a divides beneficiaries into two classes, placing the favored ones in subdivision 1 and all others in subdivision 2. The first five thousand dollars of transfer to any of the persons mentioned in the first subdivision is exempt, while the persons in the second subdivision are given an exemption of one thousand dollars.

For instance, if a person who died possessed of a net estate of one hundred thousand dollars should leave it by his will to one hundred people in equal shares, there would be no tax. If he should leave it in equal shares to twenty persons who come within the terms of subdivision 1 of section 221a, there would be no tax. On the other hand, if he gave the entire one hundred thousand dollars to a single individual who was one of those mentioned in subdivision 1, the first five thousand dollars would be exempt and there would be a tax of one thousand four hundred dollars on the remaining ninety-five thousand dollars; and if to a single individual other than those enumerated in the said subdivision 1, the first one thousand dollars would be exempt and there would be a tax of five thousand four hundred and forty dollars on the remaining ninety-nine thousand dollars.

(12) Subdivision 1 of § 221a

PERSONS ENTITLED TO LOWER RATES. The only persons who are entitled to the five thousand dollar exemption and the lower rates of subdivision 1, section 221a, are:

father	mother
husband	wife
child	brother
sister	wife of a son

widow of a son	husband of a daughter
child adopted as such	any lineal descendent born
in conformity with	in lawful wedlock
the laws of this state	
child to whom decedent for	
not less than ten years	
prior to the transfer stood	
in the mutually acknowledged	
relation of a parent, provided,	
however, such relationship	
began at or before the	
child's fifteenth birthday	
and was continuous for ten	
years thereafter	

A WIDOW OF AN ADOPTED SON is a "widow of a son" within the meaning and intendment of those words as used in said subdivision 1, and is entitled to the benefit of the exemption and the rates. *Matter of Duryea*, 128 App. Div. 205. A child of an adopted child is in law considered a lineal descendent of the foster-parent and entitled to the rates and exemption of a lineal descendent. *Matter of Cook*, 187 N. Y. 253-261. Husband of a deceased daughter is entitled to the exemptions and rates even though he has married again. *Matter of Ray*, 13 Misc. 480.

DIVORCED wife of a son is not entitled to the rates and exemption of this subdivision although the divorce was obtained by the wife against the son. *Matter of Merritt*, 155 App. Div. 228. The same rule applies to ILLEGITIMATE CHILDREN, *Matter of Beach*, 154 N. Y. 242-248, and also to the children of an illegitimate child who themselves were born in lawful wedlock. *Matter of Roebuck*, 79 Misc. 589.

RELATIVES OF THE HALF BLOOD. If the transfer is of personal property relatives of the half blood have the same exemptions as the representatives of the whole blood. Subdivision 13, section 98 of Decedent Estate Law, *post*, page 555.

If the transfer is of real property it would appear that

the provisions of section 90 of the Decedent Estate Law would govern. The question seems not to have been passed upon in the reported decisions. The section reads: "Relatives of the half-blood and their descendants, shall inherit equally with those of the whole blood and their descendants, in the same degree, unless the inheritance came to the intestate by descent, devise or gift from an ancestor; in which case all those who are not of the blood of such ancestor shall be excluded from such inheritance."

(13) Subdivision 2 of § 221a

HIGHER RATES TO THOSE NOT ENUMERATED. All those not enumerated in the first subdivision fall within the provisions of subdivision 2 of section 221a. Where a person dies intestate and his heirs and next of kin are unknown the tax is at the highest rate. *Matter of Lind*, 132 App. Div. 321, affirmed, without opinion, 196 N. Y. 570.

(14) Method of computing tax

Considerable doubt at first existed regarding the method of computing the tax and exemptions under the present act, the surrogates of the different counties construing the statute in various ways. The subject has now been set at rest by the Court of Appeals in *Matter of Schwarz*, 209 N. Y. mem., *post*, page 399, which overrules *Matter of Elletson*, 75 Misc. 582.

(15) Beneficiary enumerated in subdivision 1

If a man should give by his will the sum of four thousand five hundred dollars to his brother there would be no tax at all. If he should give him five thousand five hundred dollars there would be a tax of five dollars on five hundred dollars. *Matter of Schwarz*, *supra*; *Matter of Eaton*, 79 Misc. 69; *Matter of Kip*, N. Y. Law Journal, March 28, 1912, opinion quoted *post*, page 400.

Where the money or the value of the property subject to the tax is above fifty-five thousand dollars then the principle of the graded rates begins to work. Above fifty-five thousand dollars the next two hundred fifty thousand dollars is taxable at two per cent; above three hundred

five thousand dollars the next one million dollars is taxable at three per cent, and all above one million three hundred five thousand dollars the tax is at the rate of four per cent.

The application of this can best be illustrated by a hypothetical case. Assume that the transfer of property subject to the tax from the estate of his brother is of the value of two million three hundred thousand dollars. The transfer tax would be seventy-five thousand three hundred dollars, calculated as follows:

\$ 5,000.	exempt
50,000 at 1%	\$ 500
250,000 at 2%	5,000
1,000,000 at 3%	30,000
995,000 at 4%	39,800
<hr/>	
\$2,300,000	\$75,300

(16) Beneficiary under subdivision 2

The same principle applies to those persons who are not included in subdivision 1, except that the rates commence at five per cent and run up to eight per cent, and the amount of the exemption is one thousand dollars instead of five thousand dollars. Assume that the transfer of property subject to the tax to a nephew (subdivision 2 of section 221a) from the estate of his uncle is of the value of two million three hundred thousand dollars. The transfer tax would be one hundred sixty-seven thousand four hundred twenty dollars, calculated as follows:

\$ 1,000.	exempt
50,000 at 5%	\$ 2,500
250,000 at 6%	15,000
1,000,000 at 7%	70,000
999,000 at 8%	79,920
<hr/>	
\$2,300,000	\$167,420

(17) Table showing rates of tax

Assume that the entire property subject to the tax is of the value of six million seven hundred ninety thousand dollars, and that it is divided by the will of the decedent as set forth below. The total tax on the six million eight

hundred ninety thousand dollars thus distributed would be three hundred four thousand four hundred ninety dollars, calculated as follows:

<i>Beneficiary</i>	<i>Value of Interest</i>	<i>Amount of Interest Exempt</i>	<i>Amount of Interest Taxable</i>	<i>Rate</i>	<i>Tax</i>
Father	\$ 5,000	\$ 5,000		—	0
Mother	50,000	5,000	\$ 45,000	1%	\$ 450
Husband	75,000	5,000	50,000	1%	
			20,000	2%	900
Brother	305,000	5,000	50,000	1%	
			250,000	2%	5,500
Sister	325,000	5,000	50,000	1%	
			250,000	2%	
			20,000	3%	6,100
Daughter	1,305,000	5,000	50,000	1%	
			250,000	2%	
			1,000,000	3%	35,500
Son	1,325,000	5,000	50,000	1%	
			250,000	2%	
			1,000,000	3%	
			20,000	4%	36,300
Aunt	1,000	1,000	0	—	0
Not related	1,000	1,000	0	—	0
Not related	4,000	1,000	3,000	5%	150
Nephew	5,000	1,000	4,000	5%	200
Niece	50,000	1,000	49,000	5%	2,450
Uncle	75,000	1,000	50,000	5%	
			24,000	6%	3,940
Cousin	301,000	1,000	50,000	5%	
			250,000	6%	17,500
Grandmother . . .	321,000	1,000	50,000	5%	
			250,000	6%	
			20,000	7%	18,900
Grandniece	1,301,000	1,000	50,000	5%	
			250,000	6%	
			1,000,000	7%	87,500
Grandnephew . . .	1,321,000	1,000	50,000	5%	
			250,000	6%	
			1,000,000	7%	
			20,000	8%	89,100
Charitable Corporation . . .	20,000	20,000	20,000	—	0
	<u>\$6,790,000</u>				<u>\$304,490</u>

(18) Order fixing tax

An illustration of the application of section 221a is afforded in the following order:

"At a Surrogates' Court held in and for the County of New York, at the Hall of Records, in the Borough of Manhattan, City of New York, on the 1st day of August, 1913.

Present: HON. JOHN P. COHALAN, *Surrogate*.

In the Matter of the Transfer Tax upon the Estate of JOHN JACOB ASTOR, Deceased.	}	Order fixing Tax.
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Upon reading the report of the appraiser John V. Coggey, Esq., duly filed herein on the 14th day of June, 1913, wherein it appears that the said decedent died on the 15th day of April, 1912, and upon motion of Carter, Ledyard and Milburn, attorneys for the executors,

IT IS ORDERED AND ADJUDGED that the cash value of the properties referred to in said report, the transfer of which is subject to the tax imposed by the act in relation to taxable transfers and the tax to which such transfer is liable is as follows:

<i>Beneficiary</i>	<i>Cash Value of interest the transfer of which is taxable</i>	<i>Tax assessed thereon</i>
New York Yacht Club.....	\$ 500.00	\$ 25.00
James S. Armstrong	29,000.00	1,450.00
James Roosevelt Roosevelt.....	19,000.00	950.00
Douglas Robinson.....	19,000.00	950.00
Nicholas Biddle.....	19,000.00	950.00
Robert H. M. Ferguson.....	9,000.00	450.00
William A. Dobbyn	24,000.00	1,200.00
Thomas Hade	9,000.00	450.00
Herbert A. Pinkham.....	9,000.00	450.00
Madeleine Talmage Force Astor.....	7,673,896.00	290,455.84
Ava Alice Muriel Astor	4,851,758.00	177,570.32
John Jacob Astor	2,917,672.00	100,206.88
William Vincent Astor.....	68,959,599.80	2,741,883.99

JOHN P. COHALAN, *Surrogate*."

It is sometimes the practice to set forth in the order only the taxable interest passing to the beneficiaries. To illustrate, the legacy to the New York Yacht Club was one thousand five hundred dollars of which one thousand dollars was exempt, leaving five hundred dollars as the taxable amount of the legacy to be set forth in the order fixing the tax. The legacy of thirty thousand dollars to St. Paul's School of Concord was reported exempt by the appraiser under the provisions of the first sentence of section 221, and therefore does not appear in the taxing order of the surrogate.

(19) Computation of tax

The total tax of three million, three hundred sixteen thousand, nine hundred ninety-two dollars and three cents was calculated as follows:

<i>Beneficiary</i>	<i>Value of Interest</i>	<i>Amount of Interest Exempt</i>	<i>Amount of Interest Taxable</i>	<i>Rate</i>	<i>Tax</i>
New York Yacht Club \$	1,500	\$1,000	\$ 500	5% \$	25.00
St. Paul's School. .	30,000	30,000	0		0.00
J. S. Armstrong. . .	30,000	1,000	29,000	5%	1,450.00
J. R. Roosevelt. . .	20,000	1,000	19,000	5%	950.00
Douglas Robinson. .	20,000	1,000	19,000	5%	950.00
Nicholas Biddle. . .	20,000	1,000	19,000	5%	950.00
R. H. M. Ferguson	10,000	1,000	9,000	5%	450.00
Wm. A. Dobbyn. . .	25,000	1,000	24,000	5%	1,200.00
Thomas Hade	10,000	1,000	9,000	5%	450.00
H. A. Pinkham. . . .	10,000	1,000	9,000	5%	450.00
Madeline Talmage					
Force Astor	7,678,896.00	5,000	50,000	1%	
			250,000	2%	
			1,000,000	3%	
			6,373,896	4%	290,455.84
Ava Alice Muriel					
Astor.	4,856,758.00	5,000	50,000	1%	
			250,000	2%	
			1,000,000	3%	
			3,551,758	4%	177,570.32
John Jacob Astor . .	2,922,672.00	5,000	50,000	1%	
			250,000	2%	
			1,000,000	3%	
			1,617,672	4%	100,206.88

<i>Beneficiary</i>	<i>Value of Interest</i>	<i>Amount of Interest Exempt</i>	<i>Amount of Interest Taxable</i>	<i>Rate</i>	<i>Tax</i>
William Vincent					
Astor	\$68,964,599.80	\$5,000	\$50,000	1%	
			250,000	2%	
			1,000,000	3%	
			67,659,599.80	4%	\$2,741,883.99
					<hr/> \$3,316,992.03

(20) When exemption prorated

IN MATTER OF TITLE GUARANTEE & TRUST Co., 81 Misc. 106, several of the beneficiaries were entitled to legacy presently payable and also in addition to an interest in the remainder of a trust fund. The question arose whether the deduction of the exemption under § 221a should be deducted from the legacy presently payable or from the corpus of the trust fund in which the beneficiary had a remainder interest. Surrogate Cohalan disposed of the question by saying, page 112: "As the statute does not provide that any particular portion of the property passing to a beneficiary shall be exempt, but only that of the entire amount transferred \$5,000 shall be exempt, the beneficiaries are not entitled to set apart any particular \$5,000 for the exemption.

"The \$5,000 is to be deducted from the value of the entire legacy, and those entitled to participate in the trust fund disposed of in paragraph tenth of the will are entitled only to an exemption on that amount in the proportion which the entire value of the bequests made to them bears to the amount to which they are entitled under that paragraph. The amount of the tax as so ascertained is to be deducted by the executor from the amount paid over to the legatees under paragraph tenth of the will, and the tax upon the remainder of their respective interests in decedent's estate is to be paid out of the respective trust funds in which they are interested as remaindermen."

(21) Non-resident estates

The taxable amount of the New York portion of a non-

resident estate passing to each beneficiary determines the rate of tax, vide *post*, page 150.

(22) Rates of tax under prior statutes

The rates of tax have remained unchanged since the amendment by Laws of 1911, chap. 732, *post*, page 527, in effect July 21, 1911. For rates under Laws of 1910, chap. 706, vide *post*, page 521, in effect July 11, 1910 (Matter of Lane, 157 App. Div. 694), vide Matter of Jourdan, 206 N. Y. 653, *post*, page 386. For rates prior to 1910 amendment vide *post*, page 809.

(23) Trust deed

IN MATTER OF ANDREW G. AGNEW, N. Y. Law Journal, December 13, 1913, the decedent died a resident on October 6, 1912, leaving a last will and testament. On December 28, 1903, he had executed and delivered an irrevocable deed of trust by which he assigned and transferred certain personal property therein mentioned to trustees, to pay the income to him during his life and upon his death to distribute the trust fund in accordance with the provisions of the deed of trust.

Surrogate Cohalan held: “* * * the property transferred by the deed of trust is subject to a tax at the rate prescribed by the statute in effect at the date when the deed was executed. The property transferred by the decedent’s will is subject to a tax at the rate prescribed by the statute in force at the date of decedent’s death, and the value of the interests passing to the respective beneficiaries under the deed of trust should not be added to the amounts received by them as legatees under the will.”

Vide Matter of Atterbury, N. Y. Law Journal, March 25, 1913, opinion quoted *post*, page 871, and other cases cited sub Trust Deed, *post*, page 867.

PROCEDURE

PRELIMINARY TO APPOINTMENT OF APPRAISER

- | | |
|---|--|
| (1) Rights of the parties governed by the statute in existence at time of transfer. | (7) Search of safe deposit box for will. |
| (2) Procedure by statute in force when proceeding taken. | (8) Order permitting search of safe deposit box. |
| (3) Each proceeding has its own problem. | (9) Waiver from state comptroller. |
| (4) Procedure and practice not uniform. | (10) Affidavit re data required by § 238. |
| (5) Non-resident estates discussed in subsequent chapter. | (11) Release of safe deposit box. |
| (6) Jurisdiction of surrogate. | (12) Transfer of securities. |
| | (13) Separate consents issued. |
| | (14) Partnership funds or safe deposit box. |

(1) Rights of the parties governed by the statute in existence at the time of the transfer

"The rights of the parties and the amount of the tax are controlled by the statute in existence at the time of the transfer." Matter of Abraham, 151 App. Div. 441-442; Matter of Webber, *id.* 539; Matter of Miller, 110 N. Y. 216-223; Matter of Harbeck, 161 N. Y. 211-217; Matter of Pettit, 65 App. Div. 30-33, affirmed, on opinion below, 171 N. Y. 654; Matter of Keeney, 194 N. Y. 281-287, sustained in 222 U. S. 525, sub nom. Keeney v. New York; Matter of Dwight, N. Y. Law Journal, October 8, 1911 (opinion quoted *post*, page 872) affirmed, without opinion, 149 App. Div. 912; Matter of Lord, 111 App. Div. 152-154, affirmed, without opinion, 186 N. Y. 549, sustained in 211 U. S. 477, sub nom. Beers v. Glynn; Matter of Mason, 120 App. Div. 738-740, affirmed, without opinion, sub nom. Matter of Naylor, 189 N. Y. 556; Matter of Atterbury, N. Y. Law Journal, March 25, 1913, opinion quoted *post*, page 871; Matter of Stuart, *id.*, May 10, 1913, opinion quoted *post*, page 772.

The practitioner therefore should consult the statute under which the rights are to be determined. The statute

in its present amended form is set forth *supra*, page 3, and the prior acts will be found *post*, page 403.

(2) Procedure by statute in force when proceeding taken

The method of procedure in inheritance tax proceedings is controlled by the statute in force when the proceedings are taken. *Matter of Davis*, 149 N. Y. 539-545; *Matter of Sloane*, 154 N. Y. 109-113; *Matter of Abraham*, *supra*.

(3) Each proceeding has its own problem

Justice Werner remarked that "it has been justly observed by some jurist possessed of philosophical perception 'that no will has a twin brother.' This sage epigram points directly at the difficulties encountered by courts in trying to construe wills in the light of authority." *Matter of King*, 200 N. Y. 189-192. The shifting phases of conditions arising in estates make it possible to say that many transfer tax proceedings lack not only a twin brother, but seem without even a cousin of remote degree.

The construction of wills is often involved in these proceedings. *Matter of Cager*, 111 N. Y. 343-347; *Matter of Kimberly*, 150 N. Y. 90-93; *Matter of Burgess*, 204 N. Y. 265-271; *Matter of Lane*, 157 App. Div. 694. In addition, the appraiser has at times cast upon him the duty of determining the "fair market value" (second sentence of § 230) of property which has no market value. *Matter of Brandreth*, 28 Misc. 468-474, affirmed, 169 N. Y. 437, and cases cited sub *Closely Held Stock*.

The transfer tax appraisers in solving the many and intricate problems brought before them for determination act upon the principle enunciated by Justice Moody when he said: "Mistakes may occur and sometimes do occur, but it is better that they should be endured than that, in a vain search for infallibility, questions shall remain open indefinitely." *Tilt v. Kelsey*, 207 U. S. 43-56.

(4) Procedure and practice not uniform

It would seem that with appraisals being conducted in each of the sixty-two counties of the state it would be impossible to outline a method of procedure adaptable

to the circumstances of every case that might arise under the conditions existing in any of the counties. It would be futile to attempt such a task. Even the legal theories upon which the tax is assessed have been inconsistent. "Thus the legislature intended, as I think, to repeal the maxim *mobilia personam sequuntur*, so far as it was an obstacle, and to leave it unchanged, so far as it was an aid, to the imposition of a transfer tax." *Matter of Whiting*, 150 N. Y. 27-30, a decision prior to the 1911 amendment.

While the courts have been adopting inconsistent theories in the application of legal principles, it is not unnatural that the appraisers have not always been consistent in the ever-changing conditions under which their work has been performed. "But," as was said by Justice Miller in *Matter of Tiffany*, 143 App. Div. 327-334, "there should be some consistency in the application of those theories."

A uniform practice and procedure in inheritance tax matters is a consummation devoutly to be wished. An aim of this work is to furnish the practitioner precedents for each step in an inheritance tax proceeding. It is not claimed that the forms given are the only ones which can be used, or that the practice indicated is adopted by each of the surrogate's courts throughout the state. The forms are, however, in each instance precedents in actual use and the practice outlined is that followed in at least some of the jurisdictions.

(5) Non-resident estates discussed in subsequent chapter

The amendment of §§ 220 and 243 by chapter 732, Laws of 1911, in effect July 21, 1911, has greatly simplified the practice and procedure in estates of non-residents. It would only lead to confusion if this practice and procedure were taken up in conjunction with estates of residents, and therefore the subject of estates of non-residents has been treated separately, *post*, page 133.

(6) Jurisdiction of surrogate

"The surrogate's court of each county has jurisdiction,

exclusive of every other surrogate's court," to hear and determine all questions arising under the provisions of the inheritance tax statute, "where the decedent was, at the time of his death, a resident of that county, whether his death happened there or elsewhere." Subdivision 1 of § 2476 of Code of Civil Procedure; § 228 of the Tax Law; *Matter of Wolfe*, 137 N. Y. 205-211; *Matter of Ullmann*, 137 id. 403-408; *Matter of Seaver*, 63 App. Div. 283.

ISSUANCE OF LETTERS is not necessary to give surrogate jurisdiction in transfer tax proceedings. 2 State Department Reports, 497-500.

(7) Search of safe deposit box for will

If the decedent dies testate and his will is deposited in a safe deposit box, the practitioner will find that his first problem is getting the will out of the box. The safe deposit company usually will not allow the box to be opened except upon an order of the surrogate and upon notice to the state comptroller under § 227.

The application to the surrogate for the order is customarily granted *ex parte*. The following precedent indicates the character of allegations necessary in the application:

SURROGATES' COURT, COUNTY OF NEW YORK.

In the Matter of Proving the Last Will and Testament of DAVID C. ANDREWS, Deceased.	}	<i>Petition to Open Safe Deposit Box.</i>
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To the Surrogates' Court of the County of New York:

The Petition of Frances L. Andrews residing at No. 210 West 79th Street, in the Borough of Manhattan, City and State of New York, respectfully shows:

That she is the widow of the decedent herein.

That the decedent, David C. Andrews, departed this life on or about the 21st day of February, 1913, and, at the time of his decease, resided at No. 210 West 79th Street, in the City of New York, and was at the time of his death a resident of the County of New York.

That said David C. Andrews made and executed a will on or about the 13th day of October, 1899, wherein and whereby he appointed Frank S. Andrews (since deceased) and Edward Morrison executors of said will, and, in the event of the death, failure to qualify or resignation of either the said Frank S. Andrews or the said Edward Morrison, the said decedent appointed S. Stanwood Menken as the sole successor of such executor who would otherwise serve.

That your petitioner verily believes that the said decedent left no other last will and testament, but that the paper executed on or about the 13th day of October, 1899, as aforesaid, was his last will and testament.

That said David C. Andrews left him surviving his son, Joseph Andrews, as his only heir-at-law and next of kin, who is an infant under the age of fourteen years.

That at the time of his decease the said decedent had a safe deposit box in The New York Produce Exchange Safe Deposit and Storage Company in the Produce Exchange Building at the corner of Stone Street and Broadway, in the Borough of Manhattan, City, County and State of New York. That your petitioner verily believes that said paper executed on or about the 13th day of October, 1899, is now in existence and is in the safe deposit box of The New York Produce Exchange Safe Deposit and Storage Company. That in order that the estate of said decedent may be administered, it is necessary that his said will be found and probated. That it is the intention of the said Edward Morrison and S. Stanwood Menken, the said executors of the said will, to probate the same in the surrogate's court in the county of New York.

Wherefore your petitioner prays for an order, directing The New York Produce Exchange Safe Deposit and Storage Company to open the private safe or box of the said David C. Andrews, deceased, in the presence of an officer of said company, a representative of the Comptroller of the State of New York and your petitioner for the purpose of examining the contents of said safe or box to find said will and directing said officer or other representative of said company if such will is found, to deposit the same in the Surrogates' Court of the County of New York.

And your petitioner states that no prior or other application has been made for an order directing the examination of said

box in The New York Produce Exchange Safe Deposit and Storage Company.

Dated, New York, February 24, 1913.

FRANCES L. ANDREWS,
Petitioner.

State of New York, }
County of New York, } ss.:

Frances L. Andrews, being duly sworn, deposes and says: That she is the petitioner above named; that she has read the foregoing petition and knows the contents thereof; that the same is true to her own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters, she believes it to be true.

FRANCES L. ANDREWS.

Sworn to before me this
24th day of February, 1913.

J. J. McFARLAND,
Notary Public, Kings Co.,
Certificate filed in
New York County, No. 31.

(8) Order permitting search of safe deposit box

The order made upon the presentation of this petition followed the usual form:

At a Surrogates' Court, held in and
for the County of New York, at
the Surrogates' office in the Hall
of Records in the Borough of
Manhattan in the City of New
York on the 24th day of Feb-
ruary, 1913.

Present: HON. JOHN P. COHALAN, *Surrogate.*

In the Matter of Proving the Last
Will and Testament of
DAVID C. ANDREWS,
Deceased.

*Order to Open Safe Deposit
Box.*

Upon the annexed petition of Frances L. Andrews and on motion of Philbin, Beekman, Menken & Griscom, attorneys for said petitioner, The New York Produce Exchange Safe Deposit and Storage Company is ordered and directed and hereby

authorized to allow Frances L. Andrews to open the private safe or box of David C. Andrews, deceased, in the presence of an officer of said Company and of a representative of the State Comptroller and without removing anything therefrom except the last will and testament, if any be found, examine the contents of said safe or box for said will, and if said will is found, said officer of said Company or other representative of said Company is hereby

ORDERED AND DIRECTED to deposit the same with this Court.

JOHN P. COHALAN,
Surrogate.

Upon the granting of the order a certified copy should be served on the safe deposit company. If the county is one in which the state comptroller has appointed an attorney a copy of the order should be served upon the attorney, otherwise upon the state comptroller at Albany.

An appointment should then be made with the representative of the state comptroller to meet the representative of the estate at the office of the safe deposit company.

At the appointed hour the representative of the state comptroller, the safe deposit company official and the attorney for the estate meet at the safe deposit vault. The representative of the state comptroller at the time of opening the box, but not before, gives to the safe deposit company a waiver.

(9) Waiver from state comptroller

The form used in New York county is

State of New York
Office of
Transfer Tax Attorney for
The State Comptroller
In the County of New York.

September 8, 1913.

Lincoln Safe Deposit Company

Dear Sirs:

Re Estate of John Jones, deceased

The Comptroller of the State of New York hereby waives the issuance of the ten days' notice, required by § 227 of the Taxable Transfers Law, for the opening of the safe deposit box

in your custody belonging to this estate, and further consents to the release of will found therein, to the representatives of said decedent, and reseal box.

Very truly yours,
THOMAS E. RUSH,
Attorney for State Comptroller.

The box is then opened in the presence of all three, a search is made for the will and if found it is taken out by the representative of the safe deposit company and the box resealed by him. Nothing is removed from the safe deposit box at this time except the will. In compliance with the terms of the order of the surrogate the representative of the safe deposit company forthwith deposits said will with the clerk of the surrogate's court. The will is then offered for probate in the ordinary course.

It is not the usual practice to make an inventory of the contents of the box at this time, the inventory being made after the will is admitted to probate. Vide page 68.

(10) Affidavit re data required by § 238

Section 238 provides: "The state comptroller shall furnish to each surrogate a book, which shall be a public record, and in which he shall enter the name of every decedent upon whose estate an application to him has been made for the issue of letters of administration, or letters testamentary, or ancillary letters, the date and place of death of such decedent, the estimated value of his real and personal property, the names, places of residence and relationship to him of his heirs-at-law, the names and places of residence of the legatees and devisees in any will of any such decedent, the amount of each legacy and the estimated value of any real property devised therein, and to whom devised. These entries shall be made from the data contained in the papers filed on any such application, or in any proceeding relating to the estate of the decedent."

In order to comply with this direction of the statute it is the practice of the surrogate's court to require the petitioner for letters to file at the time of presentation of the petition an affidavit setting forth the data.

The printed forms furnished by some of the surrogates' courts describe this affidavit as an "affidavit under chapter 399, Laws of 1892." Section 238 of the present statute is the one referred to. The data is given in the following form:

SURROGATES' COURT, COUNTY OF NEW YORK.

In the Matter of Proving the
Last Will and Testament of
JOHN PIERPONT MORGAN,
Deceased.
As a Will of Real and Personal
Property.

Affidavit under § 238.

County of New York, ss.:

John Pierpont Morgan, Jr., being duly sworn, says: that he is the petitioner herein. That the above-named decedent died on the 31st day of March, 1913, at Rome, Italy.

That the estimated value of the real property in this state, of which said decedent died seized, is over Ten Thousand (\$10,000) dollars.

That the estimated value of the personal property of which said decedent died possessed, is over Ten Thousand (\$10,000) dollars.

That the names of the heirs-at-law and next of kin of said decedent, their places of residence, and relationship to the decedent, are as follows:

NAME	RESIDENCE	RELATIONSHIP
Frances Louisa Tracy Morgan	219 Madison Ave., Borough of Manhattan, New York City, N. Y.....	Widow.
John Pierpont Morgan, Jr.	Glen Cove, Long Island, N. Y.....	Son.
Louisa Pierpont Satterlee	37 East 36th Street, Borough of Manhattan, New York City, N. Y.....	Daughter.
Juliet Pierpont Hamilton	Sterlington, Rockland Co., N. Y.....	Daughter.
Annie Tracy Morgan	219 Madison Ave., Borough of Manhattan, New York City, N. Y.....	Daughter.

That the names and places of residence of the legatees and devisees in said will, the amount or value of each legacy, and the estimated value of any real property devised therein, are as follows:

NAME OF LEGATEE OR DEVISEE	RESIDENCE	AMOUNT OR VALUE OF LEGACY	VALUE OF DEVISE
Frances Louisa Tracy Morgan.	219 Madison Ave., Borough of Man- hattan, New York City, N. Y.	Unknown....	Unknown.
John Pierpont Morgan, Jr.,	Glen Cove, Long Island, N. Y....	Unknown....	Unknown.
Louisa Pierpont Satterlee....	37 East 36th St., Borough of Man- hattan, New York City, N. Y.	Beneficial interest for life in trust of \$3,000,- 000	
Issue of Louisa Morgan Sat- terlee.....	37 East 36th St., Borough of Man- hattan, New York City, N. Y..	Remainder in trust of \$3,000,000 subject to provisions of will.	
Juliet Pierpont Hamilton....	Sterlington, Rock- land Co., N. Y..	Beneficial interest for life in trust of \$3,000,- 000.	
Issue of Juliet Morgan Ham- ilton.....	Sterlington, Rock- Land Co., N. Y.	Remainder interest in trust of \$3,- 000,000 sub- ject to pro- visions of will.	

The other bequests in the will are set forth in like manner, closing with:

Each servant of testator's household at New York, Cragston, Prince's Gate and Dover House, who has been continuously employed by him for not less than five years next preced-

ing March 31, 1913, other than those above mentioned, \$1,000.

JOHN PIERPONT MORGAN, Jr.

Sworn to before me, this

17th day of April, 1913.

EDNA M. BLACKMAR,

Notary Public,

County of New York.

In view of the fact that this affidavit is made before the administration of the estate is commenced it is apparent that the estimated amounts to be inserted in the affidavit are necessarily very incomplete approximations. The sum inserted as the estimated amount is not conclusive upon the estate, and attorneys have fallen into the habit of under-estimating rather than over-estimating.

In some of the counties it is the practice of the surrogate to use this affidavit to obtain the information upon which, under the provisions of the second sentence of § 230, he may make, upon his own motion, an order directing that the appraisal be had.

(11) Release of safe deposit box

The recent opinion of the Appellate Division handed down on November 7, 1913, is set forth *post*, page 837. The effect of this decision may be far reaching, but at the present writing it has seemed best to give the practice as it has existed for many years.

After the granting of letters the representatives of the estate usually desire forthwith to obtain possession of the contents of the safe deposit box or vault. Section 227 is the provision of the statute which governs.

The usual practice is for the attorney for the estate to apply to the state comptroller for a waiver, making the application to the attorney for the state comptroller in counties where there is an attorney, otherwise to the comptroller's office in Albany. There should accompany the application for waiver a certificate from the clerk of the surrogate's court showing that letters have been

issued. This application should state the name of the estate, the date of death, the date of granting letters, the residence of decedent at the date of death, the place of death, the name and address of the applicant, who is usually the attorney for the executor, and the name and address of the executor or administrator, together with the name and address of the safe deposit company. Upon the filing of such an application for waiver the representative of the state comptroller does not give to the attorney for the estate the waiver asked for. He does, however, make an appointment to meet the attorney for the estate at the office of the safe deposit company.

THE RULING OF STATE COMPTROLLER, dated January 16, 1913, 1 State Department Reports, 601, gives the reason for this practice. The ruling is set forth in response to an enquiry from the People's Bank of Johnstown, N. Y., and is as follows:

"Your favor of the fourteenth inst., referring to the practice of transferring the contents of a safe deposit box, or securities, deposits or other assets, belonging to the estate of a deceased person, to the representatives of the estate, and particularly as to whether the comptroller's representative should deliver to the bank his written consent to the delivery of the contents of such box to the representatives of the deceased person before he examines the contents of said box or the securities, deposits or other assets contained therein, was duly received.

"During the lifetime of the owner of a safe deposit box neither the bank nor the state can be interested in the securities or other property the owner puts in or takes from the box. Consequently, upon application of the proper person the bank will deliver the box or securities to the owner, who generally retires to a room designated and provided by the bank or other depositary where he can examine his property privately, and when his inspection is ended the box is locked, or the securities returned to the vaults, and no one but the owner knows whether a security has been withdrawn or other securities added.

"When the owner of the box or the securities dies, how-

ever, then the statute immediately imposes certain duties upon the bank or other depositary and confers certain rights upon the state comptroller.

"Section 227 of the Transfer Tax Law provides, in substance, as follows: That no safe deposit company, bank or other institution, person or persons having in possession or under control securities, deposits or other assets belonging to a decedent shall deliver or transfer the same to the executors, administrators or legal representatives of said decedent unless:

"1. Notice of the time and place of such intended delivery or transfer be served on the state comptroller at least ten days prior to such delivery;

"2. Nor shall such transfer be made without retaining a sufficient portion or amount thereof to pay any tax and interest due upon the transfer of such securities;

"3. Unless the state comptroller consents thereto in writing;

"4. And it shall be lawful for the said state comptroller, personally or by representative, to examine said securities, deposits or other assets at the time of such delivery or transfer.

"From the foregoing it is apparent that the bank or other depositary must, upon the death of the owner of a safe deposit box, give the state comptroller ten days' notice prior to the time the bank intends to deliver or transfer the contents of the box and permit the state comptroller, *at the time of such delivery or transfer*, to examine the deposits, securities or assets, personally or by representative, and also the bank must retain a sufficient portion thereof to pay any tax which may be found due, *unless the state comptroller consents thereto in writing*.

"From this analysis of § 227 of the Transfer Tax Law it is the understanding of this department that when application has been regularly made by the executor, administrator or legal representative of the estate of a deceased person for the transfer of the securities and a date designated for the delivery thereof by notice or agreement, that when all the interested persons are assembled

it is the duty of the bank or other depository to still retain in its possession and under its immediate control and supervision the securities, deposits or other assets belonging to the decedent until the state comptroller or his representative, if he is present pursuant to notice or other arrangement, has had opportunity to examine all the securities, deposits or other assets, and that the bank has no authority to deliver the securities, deposits or other assets to the executors, administrators or legal representatives *until this examination has been made by the state comptroller or his representative.*

“If our view of the statute is correct the answer to your inquiry must be that the state comptroller or his representative should not deliver to the bank the written consent to the transfer or delivery of the securities, deposits or assets until after he has made his examination of such securities, deposits or other assets belonging to the decedent.”

At the appointed time the representative of the state comptroller and the attorney for the estate meet at the office of the safe deposit company and at that time the representative of the state comptroller brings with him a waiver in the following form:

State of New York
Office of
Transfer Tax Attorney for
The State Comptroller
In the City of New York

December 26, 1913.

Lincoln Safe Deposit Company

Dear Sirs:

Re Estate of John Jones

The Comptroller of the State of New York, hereby waives the issuance of the ten days' notice, required by § 227 of the Taxable Transfers Law, for the opening of the safe deposit box in your custody belonging to this estate, and further consents to the transfer of any securities or other property found therein, to the representatives of said decedent.

Very truly yours,
THOMAS E. RUSH,
Attorney for the State Comptroller.

It will be noted that the waiver to the safe deposit company is broader in its language than the one issued at the time that an examination of the box was being made for the purpose of discovering whether the will was in the box. The safe deposit company usually requires that the attorney for the estate shall before the opening of the box furnish it with a certificate from the clerk of the surrogate's court showing that letters have been issued. 1 State Department Reports, 579. The certificate having been handed to the representative of the safe deposit company, and the waiver exhibited to him, he thereupon permits the safe deposit box to be opened.

The representative of the state comptroller then proceeds to make an itemized inventory of all of the contents of the box. Very often there will be in the box securities or property which do not belong to the decedent. In such a case the attorney for the estate should ask the representative of the state comptroller to note upon the inventory the fact that a claim is made that the securities or property in question do not belong to the decedent. Considerable confusion sometimes arises at the opening of a safe deposit box and an error is fallen into of thinking that inasmuch as a representative of the state comptroller insists upon making a list of the securities and property in the box which do not belong to the decedent, that such act on his part is in some way conclusive upon the estate. It is not so at all for the representative of the state comptroller is simply performing his administrative duty of reporting to his superior the contents of the box. The question as to who owns the property contained in the box will later on be tried out and settled in the transfer tax proceeding. *Vide* Matter of Francis, N. Y. Law Journal, August 12, 1913, opinion quoted sub Ownership of Property, *post*, page 749; Matter of Lawrence, *id.*, February 15, 1913, *post*, page 701.

After this inventory has been made by the representative of the state comptroller the safe deposit box is then free. The inventory so made is kept by the representa-

tive of the state comptroller in his files, and when the transfer tax proceedings are held before the appraiser the attorney for the state comptroller has the inventory before him to compare with the list of assets filed by the estate. Sometimes errors arise and it is well for the attorney for the estate to make a duplicate copy of this inventory for the files of the estate.

(12) Transfer of securities

The delivery or transfer of securities, deposits or other assets is governed by § 227. It is not the practice to give the ten days' notice mentioned in said section, but to make an application for a consent to such delivery or transfer. This application is made direct to the comptroller in counties where there is no attorney for the comptroller but in counties where there is an attorney, the application is made to the attorney. The application is usually made by the attorney for the estate and should be addressed to either the state comptroller or his attorney, as the case may be. No set form is used, but the following may be used as a guide.

Sir:

John Jones died at St. Luke's Hospital, in the Borough of Manhattan, City of New York, on the 1st day of September, 1913. At the time of his death he was a resident of the county of New York. Letters testamentary have been duly issued by the Surrogates' Court, County of New York, on the 15th day of September 1913 to Henry Smith who resides at 1744 Broadway in the Borough of Manhattan, City of New York. Herewith enclosed certificate of clerk of the Surrogates' Court showing that letters have been issued. As attorney for said executor, I ask that in pursuance of the provisions of § 227 of the Tax Law, waivers be issued for the transfer of the following:

- 100 Shares of the Preferred Stock of American Car and Foundry Company;
- 100 Shares of the Common Stock of Chicago and Northwestern Railway Company;
- 100 Shares of the stock of the New York Central and Hudson River Railroad Company;

Ten \$1,000 bonds of the Atchison, Topeka and Santa Fe Railway Company, General Mortgage, 4% 100-year Gold Coupon Bond, payable October 1, 1995;

Five \$500 bonds of the Northern Pacific Railway Company, Prior Lien Railway and Land Grant, 4% Gold Bond, payable January 1, 1997;

Garfield National Bank. \$3,405.68

Columbia-Knickerbocker Trust Company 5,000, with interest
Bank for Savings. 1,340.87, with interest

(13) Separate consents issued

Upon the presentation of such an application separate consents addressed to the respective corporations will be issued and delivered to the applicant. The consents granted upon such an application follow this form:

State of New York
Office of
Transfer Tax Attorney for
The State Comptroller
In the City of New York

October 1, 1913.

Chicago and Northwestern Railway Company

Dear Sirs:

Re Estate of John Jones

The Comptroller of the State of New York hereby waives the issuance of the ten days' notice, required by § 227 of the Taxable Transfers Law and further consents to the transfer, by you, to the representatives of this estate, or otherwise, of the following personal property now standing on your books in the name of the decedent:

One hundred shares of Common Stock.

Yours very truly,
THOMAS E. RUSH,
Attorney for State Comptroller.

The consents so obtained are to be delivered to the respective corporations to whom the various consents are addressed, at the time the transfer is to be made.

It is suggested that the attorney for the estate retain in his files a copy of his application for consents and also copies of the consents. He will find that upon the transfer

tax proceeding the attorney for the state comptroller will have in his files the original application and a copy of the consent, and that a comparison of the figures given in the affidavit of assets will be made at the time of the hearing before the appraiser. Frequently affidavits of assets are prepared which do not at all conform in their schedule of assets with the applications and consents. It is to be assumed that this defect is due to the fact that attorneys do not have before them copies of the applications and consents when they prepared the affidavit of assets.

Often after the original application for waivers has been made some new asset will be discovered for which a waiver is necessary. A like application should be made for such a waiver as made in the first instance. It will expedite matters to present again a certificate of the clerk of the surrogates' court showing that letters have been issued. The issuance of these waivers is not dependent upon transfer tax proceedings having been commenced.

If letters have not been issued (*supra*, page 57) it is usually the practice for the representative of the state comptroller to request that an affidavit be furnished setting forth the assets of the estate.

(14) Partnership funds or safe deposit box

RULING OF STATE COMPTROLLER, dated February 21, 1913, 2 State Department Reports, 496, holds that consent should be obtained under § 227 when one of the partners dies; opinion quoted *post*, page 753. Vide *People v. Mercantile Safe Deposit Company*, 158 App. Div., opinion quoted *post*, page 837.

PROCEDURE

DESIGNATION OF APPRAISER AND NOTICE OF HEARING

- | | |
|--|---|
| (1) The appraiser. | (6) Necessary parties. |
| (2) Surrogate on his own motion may order appraisal. | (7) Transferees other than by will or intestacy. |
| (3) Practice in certain counties. | (8) Notice should be explicit as to property to be appraised. |
| (4) Petition for appointment of appraiser. | (9) Practice in New York County. |
| (5) Order appointing appraiser. | (10) Special guardian. |

(1) The appraiser

The county treasurer acts as appraiser (first sentence of § 230) except in the seventeen counties of Albany, Bronx, Dutchess, Erie, Kings, Monroe, Nassau, New York, Niagara, Oneida, Onondaga, Orange, Queens, Rensselaer, Richmond, Suffolk and Westchester (§ 229).

In the seventeen enumerated counties appraisers are appointed by the state comptroller who hold office at his pleasure. *People ex rel. McNeile v. Glynn*, 128 App. Div. 257; *People ex rel. McKnight v. Glynn*, 56 Misc. 35; *Matter of Weeks v. Kraft*, 147 App. Div. 403. In such counties the surrogate cannot designate as appraiser any person other than the person, or one of the persons, appointed by the state comptroller under the provisions of § 229. *Matter of Sondheim*, 32 Misc. 296, affirmed, 69 App. Div. 5.

For general functions of appraiser vide *Matter of Barnes* and other cases cited sub Appraiser, *post*, page 596.

(2) Surrogate on his own motion may order appraisal

The Surrogate may, upon his own motion, without any previous application on the part of anyone, make an order directing the County Treasurer, or in the seventeen counties mentioned, designating the person or one of the persons appointed to act as Transfer Tax Appraiser "to fix the fair market value of property of persons whose estates shall be subject to the payment of any tax imposed" by the transfer tax statute (second sentence of § 230). In many of the counties the Surrogate as a matter of practice makes

such an order on his own initiative. Matter of O'Donohue, 44 App. Div. 186-189. The order so made is in the following form:

At a Surrogate's Court held in and for
the County of Rockland, at the Sur-
rogate's office in Clarkstown, on the
27th day of February, 1913.

Present—WILLIAM McCauley, *Surrogate*.

In the Matter of the Estate of HELEN G. LAWTON, Deceased.	}	<i>Order Appointing Appraiser</i>
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It appearing to the satisfaction of the Surrogate that certain property left by the above named Helen G. Lawton of Orangetown, deceased, is subject to a tax, under Article X of the Tax Law, as amended, in relation to Taxable Transfers; now in pursuance of the statute in such cases made and provided:

I do hereby appoint Walter G. Hamilton, Esq., County Treasurer of the County of Rockland, N. Y., appraiser for the purpose of fixing the fair market value of the property which is subject to the payment of said tax.

And I direct said appraiser to give notice by mail to all persons known to have a claim or interest in the property to be appraised, including the State Comptroller, of the time and place when he will appraise the same.

And I further order and direct that at the time and place in such notice mentioned, the said appraiser shall appraise the said property at its fair market value and take proof of the debts of the deceased and the expenses of the administration of said estate and forthwith make a report of his proceedings, in writing, to the Surrogate.

And it is further ordered that the said appraiser forthwith give notice by mail to the following named persons (and to all others) known to have or claiming an interest in the property of the said Helen G. Lawton, deceased, subject to the payment of said taxes, viz.:

Henry G. Lawton, son, executor, Nyack, N. Y.
Mary J. Jackson, daughter, Haverstraw, N. Y.
Margaret H. White, sister, Morristown, N. J.
Elizabeth Murray, legatee, Palisades, N. Y.

Enter,

WILLIAM McCauley, *Surrogate*.

(3) Practice in certain counties

The practice differs in the various counties as to the procedure after the order appointing appraiser has been made by the surrogate. Outside of New York and a few other counties the practice is quite general for the appraiser to take the next step without any action on the part of the representatives of the estate. In such counties the appraiser, in pursuance of the provisions of the third sentence of § 230, forthwith gives notice by mail to all "persons known to have a claim or interest in the property to be appraised, including the state comptroller, and to such persons as the surrogate may by order direct, of the time and place when he will appraise such property."

The names and addresses of the persons to whom notices are to be sent are obtained from the data filed in pursuance of the provisions of the first and second sentences of § 238. Vide *supra*, page 61. The order appointing appraiser usually sets forth the names and addresses of the persons to whom the appraiser is to give notice. As to notice and necessary parties vide *post*, page 77.

(4) Petition for appointment of appraiser

In New York County the general practice is for the surrogate to designate an appraiser upon the petition of some person interested in the estate. This petitioner usually is the executor or administrator. Upon the presentation of the petition to the surrogate it is not necessary to give notice to anyone, the application for the designation of an appraiser being *ex parte*. The form used in New York County is as follows:

SURROGATES' COURT, NEW YORK COUNTY.

In the Matter of the Transfer
Tax upon the Estate of
JOHN JACOB ASTOR,
Deceased.

*Petition for Appointment of
Appraiser.*

To the Surrogates' Court of the County of New York:

The petition of Nicholas Biddle respectfully shows:

First: That John Jacob Astor died on the 18th day of April,

1912, at sea, being at the time of his death a resident of the County of New York, State of New York, and leaving a last Will and Testament which was duly admitted to probate by the Surrogates' Court of the County of New York on the 22d day of May, 1912, and that letters testamentary thereon were duly issued by said court on the same day to your petitioner and to James Roosevelt Roosevelt and Douglas Robinson, the address of each of whom is No. 23 West 26th Street, Borough of Manhattan, City of New York.

Second: That as your petitioner is informed and believes the property of said decedent or some portion thereof or some interest therein is or may be subject to the payment of the tax imposed by the law in relation to taxable transfers of property.

Third: That all the persons who are now in being and the corporations who are interested in said estate and who are entitled to notice of all proceedings herein and their post-office addresses are as follows:

Hon. William Sohmer, Comptroller, Albany, N. Y.

William Vincent Astor, 23 West 26th Street, Borough of Manhattan, City of New York.

Madeleine Talmage Force Astor, 240 Fifth Avenue, Borough of Manhattan, City of New York.

Ava Alice Muriel Astor, % Ava L. W. Astor, 18 Grosvenor Square, London, England.

St. Paul's School, Concord, New Hampshire.

New York Yacht Club, 37 West 44th Street, Borough of Manhattan, City of New York.

James S. Armstrong, Red Hook, Dutchess County, N. Y.

James Roosevelt Roosevelt, 23 West 26th Street, Borough of Manhattan, City of New York.

Douglas Robinson, 23 West 26th Street, Borough of Manhattan, City of New York.

Nicholas Biddle, 23 West 26th Street, Borough of Manhattan, City of New York.

Robert H. M. Ferguson, Silver City, New Mexico.

William A. Dobbyn, 23 West 26th Street, Borough of Manhattan, City of New York.

Thomas Hade, 366 East 207th Street, Borough of Manhattan, City of New York.

Herbert A. Pinkham, Rhinebeck, Dutchess County, N. Y.

That all the above-named persons are of full age and sound mind except William Vincent Astor, who is a minor over the

age of fourteen years and Ava Alice Muriel Astor, who is a minor under the age of fourteen years.

THEREFORE your petitioner prays that you will designate an appraiser as provided by law.

Dated, July 11th, 1912.

NICHOLAS BIDDLE,
Petitioner.

State of New York, }
County of New York, } ss.:

Nicholas Biddle, being duly sworn, deposes and says: That he is the petitioner in the above-entitled proceeding; that he has read the foregoing petition and knows the contents thereof and that the same is true to his own knowledge except as to the matters therein stated to be alleged on information and belief and that as to those matters he believes it to be true.

NICHOLAS BIDDLE.

Sworn to before me this
11th day of July, 1912.

PHILIP C. BROWN,
Notary Public,
New York County, No. 169.
New York Register, No. 4022.

(5) Order appointing appraiser

The order granted upon this application follows this form:

At a Surrogates' Court held in and
for the County of New York at
the Hall of Records in the
Borough of Manhattan, City of
New York, on the 15th day of
July, 1912.

Present: HON. JOHN P. COHALAN, *Surrogate*

In the Matter of the Transfer
Tax upon the Estate of
JOHN JACOB ASTOR,
Deceased.

Order Appointing Appraiser.

On reading and filing the petition of Nicholas Biddle, one of the executors of the last Will and Testament of John Jacob Astor, deceased, I do hereby, pursuant to the requirements of

§ 230 of Chapter LX of the Consolidated Laws direct John V. Coggey, Esq., to fix the fair market value of the property which was of the above-named decedent, and which is subject to the payment of any tax imposed by Article X, Chapter 62 of the Laws of 1909 and the acts amendatory thereof and supplemental thereto.

JOHN P. COHALAN,
Surrogate.

(6) Necessary parties

In preparing the petition for the appointment of the appraiser the practitioner should be careful to include the names and addresses of all the persons or corporations who may have a claim or interest in the property to be appraised. The reason for this is that the appraiser uses the list so given as the one from which he sends out the notices of appraisal. Therefore, if, when the tax proceedings are under way it appears that all the persons interested in the estate have not been included in the petition, it will then become necessary for the appraiser to send out a notice to such additional persons. *Matter of Wood*, 40 Misc. 155-156. Comptroller is a necessary party. § 230.

IN INTESTACY there should be set forth the name of the widow or husband and the names of all the heirs at law and next of kin in cases where the decedent owned both real and personal property. Where the decedent dies possessed of only personal property then there should be given the name of the husband or widow and the names of the next of kin.

WHERE THERE IS A WILL it is not necessary to include the names of any persons except those named in the will as beneficiaries. Of course, if there is a will contest, then the determination as to who would be the interested parties and consequently the proper parties to the transfer tax proceedings, cannot be determined until the will contest is out of the way. *Matter of Westurn*, 152 N. Y. 93-103. The statute recognizes the possibility of this contingency and in § 223 provides that if "by reason of claims made upon the estate, necessary litigation or other unavoidable cause of delay" the tax cannot be determined and paid, then the 10% per annum penalty shall not begin to run

until the cause of the delay has been removed. Vide cases cited sub Interest *post*, page 721.

(7) Transferees other than by will or intestacy

In both cases of testacy and intestacy, there should also be inserted in the petition for the appointment of an appraiser, the names and addresses of all persons subject to the provisions of subdivisions 4 and 6 of § 220. The necessity of including the names of such persons is often overlooked. The importance of including the correct names and addresses in this petition is due to the fact that failure to give the statutory notice is a jurisdictional defect. Matter of McPherson, 104 N. Y. 306-321; Matter of Wolfe, 137 N. Y. 205-213; Matter of Winters, 21 Misc. 552-555.

“THE ORDERLY AND ECONOMICAL ADMINISTRATION OF THE TRANSFER TAX STATUTE requires that all questions arising in connection with the taxability of the assets of an estate should be determined in one proceeding.” Matter of Catherine G. Leeds, N. Y. Law Journal, April 23, 1913.

In the Leeds estate an appraiser was appointed and the executors filed the customary affidavit of assets. They did not include in the list of assets certain property in which the decedent had a life interest. The trustee of the fund in which decedent had a life interest petitioned the surrogate under the first sentence of § 231 asking for an order declaring that the transfer of the remainder was not taxable. Surrogate Fowler in denying the application said, that “while technically it may not constitute a part of the estate of Catherine G. Leeds at the time of her death, the word estate in the title of the transfer tax proceeding is used in a general sense and comprehends all property passing to beneficiaries or legatees either under the will of Catherine G. Leeds or by virtue of any deed of trust executed by her. * * * Therefore the taxability of the interest of Catherine G. Leeds in the corpus of the trust fund which passed upon her death to her heirs should be determined in the proceeding now pending before the appraiser for the purpose of appraising the

assets of her estate under the provisions of the Transfer Tax Law. The application for exemption is therefore denied, but without prejudice to the right of the heirs and legatees of Catherine G. Leeds to raise this question before the appraiser in the proceeding now pending before him to determine the tax upon the estate of Catherine G. Leeds, deceased."

(8) Notice should be explicit as to property to be appraised

Justice Gaynor in *Matter of Backhouse*, 110 App. Div. 737-739, affirmed, without opinion, 185 N. Y. 544, said: "The surrogate had power to modify his decree, and should have done so, first, because the said children were not bound by it in so far as it imposed the tax in respect of the property they took under their grandfather's will, for they were only notified of an appraisal of their father's estate, and that was therefore the limit of the jurisdiction of the appraiser and surrogate on their default." Vide etiam decision of Surrogate Beckett in *Matter of Lowndes*, 60 Misc. 506 (1908).

The practice has not, in many instances, followed the rule laid down in the *Backhouse* case, *supra*. It would seem, however, that Justice Gaynor's statement of the law is accurate, and that the notice of the appraiser should be explicit as to the property to be appraised, especially when the appraiser purposes to appraise property that "while technically it may not constitute a part of the estate" of the decedent, still is to be appraised in the decedent's estate under the rule laid down in the *Leeds* case, *supra*.

(9) Practice in New York County

In many of the counties the practice as to the sending of the notice is as outlined *supra*, page 74. In New York the practice is for the attorney for the estate to obtain a certified copy of the order appointing appraiser and to file it with the transfer tax appraiser designated in the order. The appraiser will not receive this certified copy

of the order, however, unless there is filed with it an affidavit for appraisal. Upon filing with the appraiser one certified copy of said order and one copy, not certified, of the petition upon which the order was granted, the original affidavit for appraisal and two copies of said affidavit, the appraiser for the first time takes cognizance of the proceeding.

The appraiser thereupon, in accordance with the provisions of the third sentence of § 230, sends out, by mail, a notice to all the persons named in the petition. The notice is in the following form:

SURROGATES' COURT, COUNTY OF NEW YORK.

In the Matter of the Appraisal,
under the Transfer Tax Law,
of the Estate of
MARGARET MACNEILAN,
Deceased.

Notice of Appraisal.

You will please take notice, that, by virtue of an order of one of the Surrogates of the County of New York, made and dated the 4th day of October, 1912, and pursuant to the provisions of the law relating to Taxable Transfers of property, I shall on the 11th day of December, 1912, at 11:15 o'clock in the forenoon of that day, at room No. 2900, City Investing Building, 165 Broadway, in the Borough of Manhattan, City of New York, proceed to appraise, at its fair market value, all the property of said above-named decedent, late of the County of New York, passing by the last Will and Testament or by the Intestate Laws of said State, which is subject to the payment of the tax imposed by the said law.

Dated New York, November 27, 1912.

SOLOMON GOLDENKRANZ,
Appraiser.

The statute does not provide any time for said notice, and the courts have not laid down any rule. There must be a reasonable time, however. The appraiser usually gives a ten days' notice unless some of the parties reside at a great distance from the place of appraisal, in which

case the length of time of the notice is made to conform to the circumstances.

If all the parties appear by attorney who in his notice of appearance waives notice of hearing the appraiser will dispense with the same except to the state comptroller who usually accepts a short notice. There is a rule in the office of the appraisers of New York County that "no hearing will be placed upon the calendar on less than forty-eight hours' notice."

(10) **Special guardian**

The last paragraph of § 231 provides that the surrogate may at any stage of the proceedings appoint a special guardian. It was formerly the practice to appoint special guardians but this practice is now discouraged by the courts. *Matter of Post*, 5 App. Div. 113; *Matter of Kemp*, 7 App. Div. 609, affirmed, on opinion below, 151 N. Y. 619; *Matter of Jones*, 54 Misc. 202.

PROCEDURE

THE APPRAISAL

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| (1) Duties of appraiser as defined by statute. | (7) The affidavit for appraisal. |
| (2) Surrogate may act as appraiser. | (8) Form for affidavit of appraisal. |
| (3) Application to surrogate to declare estate exempt. | (9) One original and two copies to be filed with appraiser. |
| (4) Proceedings before the appraiser. | (10) Instructions issued by appraisers' office. |
| (5) The record must be complete. | (11) Preparation of schedules. |
| (6) Report will be remitted if record insufficient. | (12) Schedule D — Beneficiaries and their interests. |

(1) Duties of appraiser as defined by statute

The statute (second sentence of § 230) provides that the surrogate "shall by order direct" the appraiser "to fix the fair market value of property of persons whose estates shall be subject to the payment of any tax imposed by this article." It then proceeds to define the duties of the appraiser as follows: "Every such appraiser shall forthwith give notice by mail to all persons known to have a claim or interest in the property to be appraised, including the state comptroller, and to such persons as the surrogate may by order direct, of the time and place when he will appraise such property.

"He shall at such time and place appraise the same at its fair market value as herein prescribed; and for that purpose the said appraiser is authorized to issue subpoenas and to compel the attendance of witnesses before him and to take the evidence of such witnesses under oath concerning such property and the value thereof; and he shall make report thereof and of such value in writing, to the said surrogate, together with the depositions of the witnesses examined, and such other facts in relation thereto and to said matter as the surrogate may order or require."

For cases regarding functions of appraiser vide page 596.

(2) Surrogate may act as appraiser

The foregoing are the only statutory provisions relative to the duties of an appraiser, except that the first sentence of § 231 provides that "the surrogate may so determine the cash value of all such estates and the amount of tax to which the same are liable, without appointing an appraiser." Under the authority thus conferred the surrogate sometimes acts as appraiser. *Matter of Baker*, 38 Misc. 151-152, affirmed, 178 N. Y. 575; *Matter of Cameron*, 97 App. Div. 436-437, affirmed, 181 N. Y. 560; *Matter of Costello*, 189 N. Y. 288-290.

If the surrogate elects to act as appraiser, his duties and powers are similar to those of the appraiser as set forth in the above quoted portion of § 230.

(3) Application to surrogate to declare estate exempt

As a matter of general practice the surrogate does not act as appraiser, but directs an official appraiser to fix the fair market value. An application to declare estate exempt is frequently made, however, to the surrogate, and if a clear case is established the surrogate will grant an order declaring estate free from tax. This is in effect an appraisal by the surrogate, and the application should be made on notice. *Matter of Collins*, 104 App. Div. 184; *Matter of Schmidt*, 39 Misc. 77.

THE NOTICE OF MOTION should be served upon the attorney for the state comptroller, and if all the parties interested in the estate do not unite in the petition it would seem that a notice of motion should be served on those not joining. It is not the practice, however, to insist upon notice being given to anyone other than the state comptroller.

The facts entitling the estate to exemption should be very fully set forth in the petition. No set form can be given for such affidavit, but it is suggested to counsel that there be used the same form as the affidavit for appraisal *post*, page 87.

UPON THE RETURN DAY if the attorney for the state comptroller does not raise an objection and the petition

is in proper form the surrogate usually grants the order. If, however, there is an objection on the part of the attorney for the state comptroller and it is made to appear that there is a question whether the estate is or is not exempt, the surrogate ordinarily denies the application.

THE ORDER exempting estate customarily follows this form:

At a Surrogates' Court held in and
for the County of New York
in the Hall of Records, Borough
of Manhattan, New York City,
on the 6th day of August, 1913.

Present: HON. JOHN P. COHALAN, *Surrogate*.

In the Matter of the Transfer
Tax upon the Estate of
ELLEN DOWER,
Deceased.

} *Order Declaring Estate Exempt.*

Upon reading and filing the verified petition of Adelaide Van Tassell Brett, executrix under the last will and testament of the above named Ellen Dower, deceased, wherein it appears that the said decedent died on February 14th, 1913, a resident of the County of New York, and that the transfer of the property of the said decedent is not subject to tax under the law relating to taxable transfers of property, and that due notice of this application was given to Thomas E. Rush, attorney for the State Comptroller, and after hearing Ernst, Lowenstein & Cane, attorneys for the executrix herein, in support of the said application and the attorney for the State Comptroller stating in open Court that there was no opposition to granting the relief prayed for,

Now, on motion of Ernst, Lowenstein & Cane, the said attorneys for the executrix, it is hereby

ORDERED, ADJUDGED and DECREED that the transfer of the property of the above entitled estate be and the same hereby is declared to be exempt from taxation under the laws relating to taxable transfers of property.

JOHN P. COHALAN,
Surrogate.

(4) Proceedings before the appraiser

AT THE TIME AND PLACE mentioned in the notice (*vide supra*, page 80), the appraiser will proceed to appraise the property. No witnesses need be produced unless the appraiser, or the attorney for the state comptroller, after examining the papers, asks that testimony be taken. In a majority of the cases coming before the appraisers, no testimony is taken. If the appraiser requires additional information, he usually is satisfied with a supplemental affidavit.

If TESTIMONY is taken the rules of evidence apply; *vide* Testimony, *post*, page 853.

(5) The record must be complete

AT THE HEARING the appraiser in examining the papers will often ask for information regarding certain allegations in the schedules. The attorney for the estate will thereupon make an oral statement which clearly explains the items in question, and he is then apt to think that the incident is closed. As a matter of fact it is not. It is necessary for the attorney to file a supplemental affidavit or affidavits in which will be incorporated the explanations he has given to the appraiser. The reason of this is very clear because everything upon which the appraiser has acted must be in the record.

It may not be possible to anticipate every question which may be asked, but it is quite possible so to prepare the schedules as to anticipate questions which would naturally arise. Much confusion will be avoided if attorneys will bear in mind that the statute provides (fourth sentence of § 230) that after the appraiser's work is finished "he shall make report thereof" to the surrogate. It is the surrogate, not the appraiser, who determines the tax. *Matter of Fuller*, 62 App. Div. 428-431, citing the first sentence of § 231.

The surrogate cannot pass upon the report of the appraiser unless the entire matters considered by the appraiser are before him. It therefore behooves the attorney for the estate to see that the record is complete. The

very fact the papers require explanation establishes that they should be supplemented so the surrogate will have before him a complete record of facts upon which to base his acceptance or rejection of the report of the appraiser.

(6) Report will be remitted if record insufficient

It is not an infrequent occurrence for the surrogate to remit the appraiser's report for this reason. In *Matter of Froelich*, N. Y. Law Journal, April 30, 1913, the surrogate remitted to the appraiser the report because "that part of his report upon which the surrogate must depend for the facts necessary to a determination of the correctness of the appraiser's conclusions, is entirely insufficient to enable the surrogate to determine the question raised." *Vide etiam Matter of Valentine*, N. Y. Law Journal, December 4, 1913, *post*, page 622.

(7) The affidavit for appraisal

THE RECORD TRANSMITTED TO THE SURROGATE in an ordinary case consists of the affidavit for appraisal. This record should be complete. It should state facts and not conclusions. If the volume of business were not so great, it might be that each transfer tax proceeding would resolve itself into a trial the purpose of which would be to discover all the taxable assets in a decedent's estate, but this cannot be, and as a result a great proportion of the estates are passed upon in affidavit form. If the affidavit is properly prepared and the estate is not a complicated one its disposition is quickly made. If the affidavit is carelessly prepared then there arises the necessity for supplemental affidavit or affidavits.

There is no set form for the affidavit, but in certain counties there has been prepared by the state comptroller's office a printed form of affidavit with printed schedules.

THE ADVANTAGE TO THE PRACTITIONER IN USING THIS PRINTED FORM is that the appraiser by looking through the form can readily see whether anything has been stricken out and if there has not, he knows at a glance that all the technical questions required by the practice

and rulings of the surrogate have been covered in the affidavit. On the other hand, if an attorney prepares an affidavit it becomes necessary to read the affidavit carefully for the purpose of discovering whether all the essential allegations are therein contained. It is therefore suggested to the practitioner that if the proceeding is in a county where forms are furnished that he obtain from the appraisers' office the printed form and use it rather than one of his own composition. If he desires to change the form, his changes can be readily observed and passed upon if made on the printed form.

(8) Form for affidavit for appraisal

The printed form commonly in use is as follows:

SURROGATE'S COURT, COUNTY OF

In the Matter of the Ap-
praisal, under the Trans-
fer Tax Law of the
Estate of
Deceased.

Affidavit for Appraisal.

The affidavit of _____ administrator *executor* of the estate of the above-named decedent, for the determination of the tax, if any, to be paid upon the assets of the said estate under the Law in Relation to Taxable Transfers of Property respectfully shows:

First: That the said decedent died a resident of the State of New York on the _____ day of _____ 191 , Intestate, leaving a Last Will and Testament, copy of which is hereto annexed, which was duly admitted to probate by the Surrogate's Court of _____ County, on the _____ day of _____ 191 , and that Letters of Administration Testamentary were duly issued by the said Surrogate's Court of _____ County on the _____ day of _____, 191 , to this deponent, whose post office address is _____ and _____ whose post office address is _____ and _____ whose post office address is _____

Second: That as such administrator *executor* deponent is personally familiar with the affairs of said estate, the property constituting the assets thereof and their fair market value, and with the debts, expenses and charges properly and legally liable as

deductions therefrom. That the decedent at the time of his or her death had no safe deposit box except .

That to the best of deponent's knowledge, information and belief, there is no person better informed than deponent upon the said affairs of this estate excepting , who is in possession of special knowledge as to said matters, or some of them, and whose supplemental affidavit is hereunto annexed.

Third: That *Schedule A* hereunto annexed in its various sub-schedules sets forth fully and in detail all the real property in the State of New York, and all the personal property wheresover situated, owned by the decedent or in which said decedent had any right, title or interest at the time of his or her death, or of which he or she made any gift, grant or conveyance in contemplation of death, or to take effect at or after death, or which by reason thereof, fell into or became part of the assets of this estate by reversion, remainder or otherwise, excepting such as may have passed by virtue of the exercise by the decedent of any power of appointment vested in him or her by the Will or Deed or other instrument of another, and enumerated in *Schedule C*.

Schedule A1 sets forth each and every parcel of real estate in the State of New York of which decedent died seized and possessed, or in which he or she had any right, title or interest, together with a statement of the liens and encumbrances upon each at the date of death, giving in the case of mortgages, the date, place, liber and page of record thereof. It also sets forth in the first marginal column the assessed valuation of each of said parcels for the year in which the decedent died and in the second marginal column the estimated market value thereof (as appraised by a competent expert in real estate values, whose supplemental affidavit is herewith submitted).

Schedule A2 sets forth all of the moneys left by the decedent at the time of his or her death, whether in his immediate possession, standing to his credit or in which he had any right, title or interest, in banks of deposit, savings banks, trust companies, or other institutions, individually, giving also separately the accrued interest thereon, if any, down to the last interest day prior to decedent's death in the case of savings banks, and down to the date of decedent's death in all other cases.

Schedule A3 sets forth all wearing apparel, jewelry, silverware, pictures, books, works of art, household furniture, horses, carriages, automobiles, boats, and any and all other personal chattels of whatsoever kind or nature, left by the decedent, together

with the fairly estimated market value thereof (as appraised by a competent expert whose supplementary affidavit is herewith submitted). It also contains a statement of all bonds and mortgages held by decedent and of all claims due and owing decedent at the time of his or her death, and of all the promissory notes or other instruments in writing for the payment of money of which he or she died possessed, of whatsoever nature, with interest thereon, if any (except such as are included in the statement of the decedent's interest in a co-partnership or business set forth in *Schedule A5*), giving the face values and estimated fair market values thereof and if such estimated fair market values be less than the face value, setting forth in brief the reason for such depreciation as to each item. Said *Schedule A3* also contains a statement of any and all moneys payable to the estate from life insurance policies carried by decedent.

Schedule A4 sets forth all the corporate stocks, bonds with accrued interest thereon to the date of decedent's death, or other investment securities owned by the decedent at the time of his or her death, with the market value thereof at such time, and in the case of rare and unlisted corporate securities giving the State of incorporation of the corporation issuing the same, its capitalization, the value and nature of its assets, its liabilities, its surplus, the book value of its stock, the dividends paid and any other facts which may be pertinent affecting the value of said securities.

Schedule A5 sets forth the interest of decedent at the time of his or her death in any co-partnership or business, stating the nature and location thereof, the total capital employed, the gross profits, expenses and net profits of the business for at least three years prior to decedent's death, and any other facts pertaining to such business as may be pertinent to a fair and just appraisal of decedent's interest in said business and the goodwill thereof. (Submitted to the appraiser herewith is a certificate and two copies thereof showing the amount of the decedent's interest in such business and goodwill thereof, made by a competent accountant).

Schedule A6 sets forth in itemized form, together with the fair market value thereof, any other property owned or left by decedent at the time of his or her death and not included in the preceding sub-schedules, or in *Schedule E*.

Fourth: That *Schedule B* hereunto annexed in its various sub-schedules sets forth the funeral expenses, ministration expenses

and counsel fees paid or incurred in connection with the estate, together with the debts of and claims against the decedent (except liens and incumbrances upon real estate), whether allowed, paid or contested and rejected by the administrator *executor*. Deponent also claims to be allowed as a deduction herein the lawful commissions of the administrator *executor and trustee*.

Schedule B1 sets forth the funeral expenses. *Schedule B2* sets forth the expenses of administration and counsel fees paid or estimated. *Schedule B3* sets forth the valid debts due and owing by decedent at the time of his or her death and allowed as just and fair by the administrator *executor*, together with a separate list of such claims as have been contested or rejected by him (except such as enter into the computation of decedent's interest in any co-partnership or business as set forth in *Schedule A5*). *Schedule B4* sets forth any and all items claimed by the administrator *executor* as proper deductions herein, and not included in the prior sub-schedules.

Fifth: That *Schedule C* hereunto annexed sets forth all the property, real and personal, which passed at decedent's death by virtue of the exercise by him or her of any power of appointment vested in him or her by the will, deed or other instrument of another, together with the fair market value of each and every item thereof and a statement in brief of the source and derivation of such power, copies of which will, deed or other instrument are submitted herewith. Said *Schedule C* also sets forth all sums by way of commissions properly and legally chargeable against such property.

Sixth: That *Schedule D* hereunto annexed contains a statement of the names of all persons beneficially interested in this estate at the time of decedent's death, the nature of their respective interests, their relationship if any to the decedent, together with the ages at the time of decedent's death of all minors, annuitants and beneficiaries for life under decedent's will, if any. It also contains a statement showing which of the beneficiaries named in decedent's will, if any, died prior to decedent, the dates of their deaths, their survivors, and the relationship of such survivor to decedent.

Seventh: That *Schedule E* sets forth property of every kind held by the decedent in trust for or jointly with another or others.

Eighth: That deponent has made due and diligent search for property of every kind, nature and description left by the decedent, and has been able to discover only that set forth in *Sched-*

ules *A* and *E*, and that no information of other property of the decedent has come to his or her knowledge, and that he verily believes that decedent left no property except as therein set forth. That all the sums claimed as deductions in *Schedule B* are lawful, just and fair, that to the best of deponent's knowledge, information and belief, the decedent made no gift, grant or conveyance of any property, real or personal, in contemplation of death, or to take effect at or after death, except as may be so specifically set forth in the appropriate sub-schedule of Schedule A.

Deponent further says that wherever in any of said sub-schedules the word "none" has been written in or wherever such sub-schedule has been left blank, such word or omission is to be taken as equivalent to an affirmative allegation by deponent that the decedent left no property of the kind to which said sub-schedule relates.

Dated, New York City , 191 .

State of New York, }
County of } ss:

, being duly sworn, says that he is the affiant named in the foregoing affidavit for appraisal, that he has read the said petition and the schedules thereunto annexed, and knows the contents thereof, and that same are true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes them to be true.

Sworn to before me this }
day of , 191 . }

State of New York, }
County of } ss:

, being duly sworn, says that he resides at
That by reason of the fact that

he has special knowledge of the articles and things set forth in Schedules of the affidavit of , verified the day of , 19 , hereunto annexed. That he has read said Schedules and knows the contents thereof.

That the values of the assets therein set forth and the several sums claimed as deductions therein are just and true to best of deponent's own information and belief, and that the deponent hereby adopts said Schedules , and accepts and makes same part of this affidavit as if here set forth fully and in detail. Deponent further says he knows of no other property left by decedent herein except as set forth at Schedule A of said application.

Sworn to before me this
day of , 191 . }

(9) One original and two copies to be filed with appraiser

There should be filed with the appraiser one original of the affidavit and two copies thereof. In pursuance of the provisions of the last sentence of § 230 the appraiser is required to make his report in duplicate, one of which he files in the office of the surrogate and the other in the office of the state comptroller. The third copy is retained in the office of the appraiser as an office copy for his files.

One certified copy of the order appointing appraiser and one copy of the petition upon which the order is made are filed with the appraiser as indicated *supra*, page 79. With this exception there should be filed three of all other papers, one original and two copies. If the original of any paper introduced in evidence is not required to be filed, then there should be furnished three copies.

(10) Instructions issued by appraisers' office

In the counties of Kings and New York the appraisers' office issue instructions for the use of the forms as follows:

The following instructions regarding the use of the accompanying forms are issued for the guidance of counsel in the preparation of cases for the Transfer Tax proceeding.

These particular forms are designed for estates of **RESIDENT DECEDENTS** only.

They are available for use by either executors or administrators. When used by either, strike out the allegations in the petition applicable to the other. In cases where supplementary affidavits of appraisal are not to be submitted, strike out the

allegation in parenthesis in the body of the petition referring thereto.

The use of these forms is not intended to preclude the submission of supplementary affidavits as to any matter relevant to the appraisal and not covered by the allegations contained in the petition, nor to preclude the taking of testimony whenever necessary.

The affidavit of verification and a supplemental affidavit to be filled in and sworn to by any person having more particular knowledge than the executor or administrator as to the items of assets or deduction contained in any sub-schedule will be found on the inside page of the back cover.

Nothing but the schedule and sub-schedule sheets are to be placed within the cover form. Three copies of the will, and of any and of all supplementary papers are to be submitted separately as heretofore.

Counsel will please be particularly careful to see that the values placed upon the several items of assets and the items of deductions claimed are typewritten in only in the columns of the appropriate sub-schedules designated, "ESTIMATED MARKET VALUE," "AMOUNT" AND "CLAIMED," as the case may be. As to the real estate, the assessed valuation for the year of the decedent's death must also be given in the column provided therefor. NOTHING IS TO BE WRITTEN IN THE COLUMNS DESIGNATED "VALUE AS APPRAISED IN THIS PROCEEDING" AND "ALLOWED." These are intended to be filled in by the Appraiser at or subsequent to the hearing.

The sub-schedule sheets are furnished to counsel loose so that they may be conveniently run through the typewriter. When returned to this office, they are to be put through the typewriter here to receive the figures fixed and determined by the Appraiser, in the column designated "VALUE AS APPRAISED IN THIS PROCEEDING," therefore they must be returned loose or held by temporary clips only. They must not be permanently bound.

Should it be necessary to use additional sheets for any schedule, please have the same ruled in double column in all respects like the printed form. Such additional sheets may, however, be designated by the sub-schedule number only as A4, B3, etc.

Assets, deductions and all other data relating to POWER OF APPOINTMENT PROPERTY, must be set forth in SCHEDULE C ONLY.

As to any property standing in the name of the decedent, jointly or in trust for any other person, counsel are required to submit supplementary affidavits setting forth the precise facts and circumstances relative thereto.

(11) Preparation of the schedules

The schedules should be so prepared as not to require supplemental information in order to perfect the record. This seems a declaration of the self-evident, but the examination, in the course of duty, of many proceedings impels the belief that some attorneys do not appreciate the advisability of having the papers properly prepared in the first instance.

SUPPLEMENTAL AFFIDAVITS ARE TO BE AVOIDED. From the standpoint of the appraiser it means multiplying his work for the reason that when the supplemental affidavit comes in he has to take up the case anew to see whether it meets the requirements. And this is not all, for frequently some new angle will develop from the supplemental affidavit which will require further elucidation. This means delay, and increased labor on the part of the appraiser and the attorney for the estate as well as for the attorney for the state comptroller.

With the exception of Schedule D the schedules have been taken up *ad seriatim* in the following chapters.

(12) Schedule D—Beneficiaries and their interests

This is the schedule which the appraiser examines to find out how the property of the decedent is to be distributed. It should contain a statement of the names of all persons beneficially interested in the estate at the time of decedent's death, the nature of their respective interests, their relationship, if any, to the decedent, together with the ages at the time of decedent's death of all minors, annuitants and beneficiaries for life under decedent's will, if any.

It should also contain a statement showing which of the beneficiaries named in decedent's will, if any, died prior to decedent. *Morgan v. Cowie*, 49 App. Div. 612-615.

If the devise or bequest to beneficiaries who predecease testator does not fall into the residuary estate then

set forth facts to show to whom interest goes. For instance, if one-half of a certain sum is bequeathed to A, a daughter of testator, and the other half to B, a sister of testator, with the proviso that the share of each shall go to the descendants if the beneficiary does not survive, and either or both A and B die sooner than the testator, leaving descendants, give the facts which will enable the appraiser to make proper distribution.

As to death of residuary legatee vide discussion in *Matter of Hoffman*, 201 N. Y. 247.

In case of intestacy give the *stirpes*. Do not say A, B, C, D and E, grandchildren, but A and B, children of X, a daughter who predeceased decedent, and C, D and E, children of Y, a son who predeceased decedent.

If claim to lower rates under subdivision 1 of § 221a is made because of the beneficiary being an adopted child, set forth the facts of the adoption. *Matter of Fisch*, 34 Misc. 146-147; *Matter of Butler*, 58 Hun, 400, affirmed, without opinion, 136 N. Y. 649.

Mutually acknowledged relationship of parent and child should be established if beneficiary is to obtain benefit of the lower rates. *Matter of Birdsall*, 22 Misc. 180-187, affirmed, without opinion, 43 App. Div. 624; *Matter of McMurray*, 96 App. Div. 128; *Matter of Davis*, 98 App. Div. 546-549, reversed on other points in 184 N. Y. 299.

Beneficiary is competent witness to give "evidence bearing upon question of the relation and the acknowledgment thereof between himself and the testator." *Matter of Brundage*, 31 App. Div. 348-352, and cases cited *post*, page 857.

PROCEDURE

THE SCHEDULES OF ASSETS

- | | |
|---|---|
| (1) Schedule A ¹ —Real property.
Foreign real estate not taxable.
Certificate under § 236.
Rent.
Assessed value.
Appraisal by real estate expert.
Mortgages to be deducted.
Dower.
Taxes.
Devolution of title. | Unrecorded operations of the appraiser's mind.
Life insurance policy.
Absence from schedules of property specified in will.
Property in safe deposit not belonging to decedent.
Debt forgiven by will. |
| (2) Schedule A ² —Cash on hand and on deposit.
Accrued interest.
Discrepancies | (4) Schedule A ⁴ —corporate stock and bonds.
Listed securities.
Rule in the Kennedy case.
Large blocks of stock.
Pledged securities.
Real estate corporation. |
| (3) Schedule A ³ —Personal chattels, mortgages, promissory notes, claims due decedent, life insurance.
Occupation of decedent.
Wearing apparel.
Tangible property within state.
Jewelry, silverware, etc.
Expert appraisals must be in affidavit form.
Must be itemized.
Mortgages.
Claims in favor of decedent. | (5) Schedule A ⁵ —interest of decedent in any co-partnership or business.
Certificate of accountant.
Assets of a co-partnership not within state.
(6) Schedule A ⁶ —Property not included in other schedules.
Interest in the estate of another.
(7) Schedule C—Power of appointment.
(8) Schedule E—Property held in trust for or jointly with others. |

"It is unfortunately true," said Surrogate Baker, Yates County, in Matter of Jones, 65 Misc. 121-123, "that many of our citizens are disposed to look upon a breach of our tax laws as a matter of thrift and to believe that they may violate such laws without being conscious of moral turpitude."

That this is not the attitude of all is shown by the fact that in transfer tax proceedings most people are con-

scientious to the last penny. However, it must be acknowledged, there are those who come within Surrogate Baker's delineation. As a result it has become the practice to inquire very thoroughly into the assets of the estate, and also to scrutinize with critical eye the deductions demanded.

The following schedules are designed to cover the questions which are apt to arise.

(1) Schedule A¹—Real Property

In this Schedule A¹ should be set forth each and every parcel of real estate in the State of New York of which the decedent died seized or in which he had any right, title or interest.

REAL ESTATE SITUATED WITHOUT THE STATE OF NEW YORK IS NOT TAXABLE and should not be set forth in the schedules. *Matter of Swift*, 137 N. Y. 77; *Keeney v. New York*, 222 U. S. 525-537.

CONTRACT OF SALE OF LANDS IN ANOTHER STATE entered into before decedent's death, but deed not delivered until day after death was held not taxable in *Matter of Baker*, 67 Misc. 360.

CERTIFICATE UNDER § 236. In preparing this schedule it is well to bear in mind that the last paragraph of § 236 provides: "Any person shall, upon the payment of fifty cents, be entitled to a certificate of the state comptroller that the tax upon the transfer of any real estate of which any decedent died seized has been paid, such certificate to designate the real property upon which such tax is paid, the name of the person so paying the same, and whether in full of such tax. Such certificate may be recorded in the office of the county clerk or register of the county where such real property is situate, in a book to be kept by him for that purpose, which shall be labeled 'transfer tax.'"

After the proceeding is all over and the certificate referred to is applied for it will be found that the certificate will contain a description of the real estate as it appeared in this Schedule A¹. Therefore it behooves the one who is preparing Schedule A¹ to make the description definite

enough to be of service when the time comes to obtain the certificate under § 236. As to just how definite this description should be depends upon the location and character of the property. In many cases the last deed description could be used. In addition there should be given a brief recital of the improvements, if any, erected upon the premises. If there are no improvements, so state.

“RENT reserved to the deceased which had accrued at the time of his death,” subd. 7 of § 2712 of Code of Civil Procedure and § 2720, is an asset and should be set forth.

THE LAST ASSESSED VALUE before decedent's death should be given for each parcel of land.

APPRAISAL BY REAL ESTATE EXPERT. It is the practice for the appraiser to ask the estate to furnish an appraisal of the real estate by a competent expert. This affidavit should be complete enough to show to the appraiser that the person who makes it is qualified as an expert in values of real estate in the neighborhood of the property appraised.

THE FORM OF AFFIDAVIT should conform with the circumstances of the case. The following is one in general use.

Surrogates' Court, County of New York.

In the Matter of the Transfer
Tax upon the Estate of
JOHN JONES,
Deceased.

*Affidavit as to Value of
Real Estate.*

County of New York, ss:

John Doe, being duly sworn, deposes and says that he has been for the past twenty years and more a resident of the City and County of New York and during that time continuously engaged as a real estate auctioneer and broker in the purchase, sale and appraisement of lands and buildings in said City and County. That his place of transacting business is No. 165 Broadway, Borough of Manhattan, City of New York.

Deponent says that he is familiar with values of real estate in said county, and especially in the immediate neighborhood of the property herein appraised. That he knows the value of

the property belonging to the estate of the above named decedent; that he has not any personal interest in said property and is not in any way connected with said estate or the attorney of said estate.

Deponent says that at the request of Richard Roe, Esq., attorney for Henry Smith, executor of said estate, he has made on the 10th day of November, 1913, a personal examination of the real estate of the aforesaid decedent for the purpose of ascertaining its fair market value on the 15th day of October, 1913, at which time, as this deponent is informed, the aforesaid John Jones, a resident of the County of New York, died seized of the parcel of real estate hereinafter described.

Location: No. 1880 ——— Avenue, east side, 60.5 feet south of ——— Place, Borough of the ———. Dimensions of Land: 32 x-feet by 9 feet, see diagram, Size of Building: about 20 x 25 feet, Stories in height: Two stories,

Materials of Building: Frame on stone foundation,
Purpose of use: Dwelling, old and adds very little, if anything, to the value of the land.

(Diagram)

These premises are designated on the Tax Maps of the City of New York as Borough of the ———, Section eleven, Volume four, Block 2950, Lot 16.

The sum for which said premises were assessed by the City of New York for the taxes due and payable on the 1st day of May, 1914, was five thousand seven hundred and fifty dollars.

The sum for which it rents annually is six hundred dollars.

The fair market value of said premises at the time of the death of the within named decedent, namely, the 15th day of October, 1913, was, in the opinion of this deponent, six thousand two hundred and fifty dollars. That in arriving at the said fair market value deponent has taken into consideration actual sales of neighboring real estate similarly situated during the year immediately preceding said 15th day of October, 1913.

JOHN DOE.

Sworn to before me this

22nd day of November, 1913.

PETER ROE,

Notary Public,

New York County.

THE AFFIDAVIT OF THE REAL ESTATE EXPERT should always recite the assessed value. The appraiser gauges to some extent the value of the real estate by its assessed value. If the appraisal is less than the assessed value the affidavit of appraisal should give fully the reasons why the value is, in the opinion of the real estate expert making the affidavit, less than the assessed value. From the standpoint of the transfer tax appraiser there is a strong presumption that the real estate is worth at least the assessed value, as otherwise the decedent in his lifetime would have had the assessment reduced.

COMPETENT EVIDENCE OF VALUE of real estate is insisted upon by the surrogate. Vide § 122 of Decedent Estate Law, page 113.

In *Matter of Mitchell*, N. Y. Law Journal, March 9, 1912, Surrogate Cohalan remitted the appraiser's report for further evidence as to the value of decedent's real estate, the surrogate saying: "There was no competent evidence before the appraiser as to the value of decedent's interest in the farm at Great Neck or the real estate at Wading River, Long Island. The fact that this property had been appraised by a transfer tax appraiser of Nassau County in June, 1906, at a certain valuation would not warrant the appraiser herein in accepting that valuation as the clear market value of the property in December, 1910."

AS TO SALE PRIOR TO APPRAISAL vide *Matter of Arnold*, 114 App. Div. 244-246. SALE SUBSEQUENT TO APPRAISAL vide *Matter of Meyer*, 209 N. Y. 386, *post*, page 397; opinion of surrogate in same case quoted from *post*, page 812.

IF THE STATE COMPTROLLER IS NOT SATISFIED with the valuation placed upon the real estate by the expert for the estate, he will present to the appraiser an affidavit of another expert engaged on behalf of the state comptroller. In the large majority of cases the question of the valuation of the real estate is settled upon the affidavits submitted. However, in some cases the point is of sufficient importance to justify the taking of testimony and the cross-

examination on the witness stand of the experts who have placed the valuation upon the real estate.

Such a situation arose in *Matter of Turner*, N. Y. Law Journal, July 8, 1913, and the executrices not being satisfied with the determination arrived at by the appraiser took an appeal under the first sentence of § 232 from the *pro forma* order entered under § 231. Surrogate Cohalan in affirming the report said: "Upon the hearing before the appraiser real estate experts were examined on behalf of the estate in order to show the value of decedent's real property in this county. A real estate expert was also examined on behalf of the state comptroller. There was a material difference between their estimates of the value of decedent's real property. The appraiser adopted the valuation of the state comptroller's expert. An examination of the testimony shows that this valuation was not unreasonable or unwarranted, and the surrogate therefore will not interfere with the finding of the appraiser."

IF DEDUCTION IS ASKED FOR MORTGAGES give the names of mortgagor and mortgagee, the date of the mortgage, its maturity date, rate of interest, date and place of recording mortgage and liber and page of mortgage. If any payment has been made on account of the mortgage, so state. Also calculate and set out interest accrued and unpaid to the date of the death of decedent.

Mortgages should be deducted from the value of the real estate and therefore should be inserted in Schedule A¹ and not in B³. *Matter of Sutton*, 3 App. Div. 208-212, affirmed, on opinion below, 149 N. Y. 618; *Matter of Berry*, 23 Misc. 230; *Kitching v. Shear*, 26 Misc. 436-438; *Matter of Offerman*, 25 App. Div. 94.

AS TO BLANKET MORTGAGES vide *Matter of Tremberger*, N. Y. Law Journal, March 6, 1912, opinion quoted *post*, page 659; etiam same case in N. Y. Law Journal, October 31, 1913, *post*, page 661.

UNPAID TAXES assessed against the real estate prior to the decedent's death, are proper deductions and should be set forth. As to what constitutes assessment vide *Matter of Babcock*, 115 N. Y. 450; *Matter of Freund*, 143

App. Div. 335-337, affirmed, on opinion of McLaughlin, J., below, 202 N. Y. 556; Matter of Maresi, 74 App. Div. 76-79; Matter of Brundage, 31 App. Div. 348; Matter of Liss, 39 Misc. 123; Matter of Hoffman, 42 id. 90, citing subd. 2 of § 2719 of Code of Civil Procedure. In setting forth the taxes give the year for which they were assessed.

IF DOWER IS CLAIMED as a deduction give date of birth of widow. Vide cases cited sub Dower. Do not attempt to compute the dower, for the statute provides (third paragraph of § 230 and second paragraph of § 231) that the calculation is to be made by the superintendent of insurance; the practice is for the appraiser, acting on behalf of the surrogate to make the request for such calculation.

As to tables used by superintendent of insurance vide *post*, page 581.

DEVOLUTION OF TITLE should be given where the interest of the decedent is other than a fee simple in the entire property. This does not mean that it is necessary to give an abstract of the title of decedent, but the record should be made complete enough to show what the interest is and how the interest arose. Matter of Willets, 119 App. Div. 119, affirmed, without opinion, 190 N. Y. 527, furnishes an illustration of the trouble caused in inheritance tax proceedings by reason of failure to observe this rule.

(2) Schedule A²—Cash in hand and on deposit.

ALL MONEYS left by the decedent at the time of his death, whether in his immediate possession, standing to his credit or in which he had any right, title or interest, in banks of deposit, savings banks, trust companies, or other institutions, should be itemized and set forth in this schedule. This means money wherever situated, and deposits no matter whether in a New York or foreign bank. Subdivisions 1 and 4 of § 220 and § 243.

JOINT AND TRUST ACCOUNTS should be set forth in Schedule E.

INTEREST ACCRUED and unpaid, distinct from the

principal, should be set forth separately. In the case of savings banks interest should be given down to the last interest day prior to decedent's death; in all other cases down to the date of death. Accrued interest to date of death has been held to be subject to the tax. *Matter of Vassar*, 127 N. Y. 1-8; *Matter of Hewitt*, 181 N. Y. 547, opinion not reported, vide *post*, page 301.

Trifling as it may seem the failure of attorneys to observe the rule regarding interest causes much annoyance. If for any reason the account does not draw interest it should be so stated. Or if the attorney cannot conveniently give separately the accrued interest, then there should be an affirmative statement that the amount given includes interest.

ACCOUNTS WITH BROKERAGE FIRMS should be accompanied with a statement of the nature of the account.

DISCREPANCIES very frequently occur between the amount stated in the application for waiver under § 227 and the sum appearing in this schedule. The reason for the variances should be explained, as for instance:

SCHEDULE A

A². CASH IN HAND AND ON DEPOSIT

	<i>Value as appraised Amount in this proceeding</i>
Cash in hand	\$ 168.32
Bowery Savings Bank, Book No. 784,349	345.86
Interest to last interest day prior to death of decedent	3.15

The amount as set forth in my application for waiver to the Comptroller of the State of New York is in excess of the amount above set forth by reason of the fact that the figure mentioned in the application for waiver was an offhand estimate made prior to balancing the pass book of the decedent. The amount above given is the correct amount.

Chemical National Bank	\$3,746.75
No Interest allowed	

The amount as set forth in my application for waiver to the Comptroller of the State of New York is in excess of the amount above set forth because intermediate between the time of decedent's death and the probate of the will certain collections from outstanding accounts due to decedent were made and deposited in the decedent's account in Chemical National Bank. The amount above given is the correct amount on deposit at the time of decedent's death. The collections so made are set forth in Schedule A³.

Columbia-Knickerbocker Trust Com- pany	1,600.00
Accrued interest thereon to date of decedent's death	16.34
German Savings Bank, Book No. 45372	\$3,000.00

Does not include interest because decedent had withdrawn from the bank all interest accrued down to and including the last interest day prior to his death.

Sometimes an estate is unfortunate in having an account in a BANK WHICH HAS BEEN CLOSED. If this contingency arises a statement should be made setting forth just what the condition is regarding the account so far as the affiant is able to state. In such a case it is often possible to get an affidavit from one in a position to make authoritative statements and if this is so an affidavit should be obtained and annexed to the papers.

By error attorneys will sometimes give as the amount on deposit to the credit of the decedent a sum collected and deposited since decedent's death. This should not be done for what the statute requires is an appraisal of the property of which decedent died seized or possessed. Subdivision 1 of § 220. Deposits so made usually come from the debts due the decedent, dividends on securities

or money realized by the legal representatives of the estate upon the sale of property of the decedent. These items should be set under their proper headings and not under this Schedule A² which is designed to include only the cash in hand and on deposit at the time of decedent's death.

(3) Schedule A³—Personal chattels, mortgages, promissory notes, claims due decedent, life insurance

OCCUPATION OF DECEDENT should be given. If he had no occupation at the time of his death, so state. The reason for this is that this information will aid the appraiser to form an opinion regarding the character and extent of the personal chattels of decedent. Frequently attorneys will file affidavits which will state that the decedent had absolutely no personal effects. The almost inevitable result of such a statement is that the appraiser requires a supplemental affidavit explaining why the decedent was devoid of personal belongings. Attorneys should anticipate this natural inquiry.

WEARING APPAREL is an item which sometimes causes unnecessary concern. In the cases where the clothing of the decedent is of the ordinary kind make a statement as to its nature, and if it has no market value say so. If, however, there are garments of value such as furs, laces, embroideries and the like, then an appraisal should be submitted, with an itemized list. Vide Matter of Astor, *post*, page 107.

THE 1911 AMENDMENT. It should be borne in mind in the preparation of this Schedule A³ that chapter 732 of the Laws of 1911, in effect July 21, 1911, made a very important change relative to the imposition of a tax upon tangible personal property of a resident. The law as now amended provides that in the case of a resident the tax is imposed on the transfer "of any intangible property, or of *tangible property within the state.*" Subdivisions 1 and 4 of § 220. For wording before the 1911 amendment vide Prior Statutes, *post*, page 520.

THE WORDS "TANGIBLE PROPERTY," the 1911 amend-

ment to § 243 provides, shall be taken to mean "corporeal property such as real estate and goods, wares and merchandise, and shall not be taken to mean money, deposits in bank, shares of stock, bonds, notes, credits or evidences of an interest in property and evidences of debt." It further provides that the words "intangible property" shall be taken to mean "incorporeal property, including money, deposits in bank, shares of stock, bonds, notes, credits, evidences of an interest in property and evidences of debt."

THE AMENDMENT IS NOT RETROACTIVE, and therefore it applies only to transfers made since the amendment went into effect. *Matter of Abraham*, 151 App. Div. 441; *Matter of Webber*, id. 539; *Matter of Niles*, N. Y. Law Journal, January 5, 1912; *Matter of Bolton*, 157 App. Div. 935, appeal pending.

THERE SHOULD BE SEPARATELY LISTED the tangible property within the state. No reported judicial ruling on the subject has been made, but the practice is to ask that all the tangible personal property be set forth. In a non-resident estate it has been held that "there is no reason why the executor of the will should be put to the annoyance and expense of preparing inventories and exhibiting the condition of an estate as to items not taxable in the State of New York." *Matter of Bishop*, 82 App. Div. 112-115.

If the claim is made that certain of the tangible property of which the decedent died seized or possessed is not subject to tax because it was not within the state, the practitioner should set forth very clearly where such property was located without the state at the time of the death of decedent and the circumstances under which it was so located.

JEWELRY, SILVERWARE, PICTURES, BOOKS, WORKS OF ART, household furniture, horses, carriages, automobiles, boats, wearing apparel, and any and all other personal chattels of whatsoever kind or nature are to be set forth in this schedule. Such of the property as is subject to the tax should be itemized and a value given for each article.

It must be remembered that the duty of the appraiser is to fix the fair market value of these assets and he cannot do so unless they are described in such a way as to permit of his passing judgment on their value.

REPORT OF THE APPRAISER REMITTED by Surrogate Cohalan in Matter of Leggett, N. Y. Law Journal, January 13, 1911, the surrogate saying: "In the affidavit of appraisal of personal property left by decedent, consisting of jewelry, pictures, household furniture, &c., there is no enumeration or description of the articles appraised, and therefore no basis upon which the appraiser or the court can determine the correctness or accuracy of such appraisal. The appraiser's report will be remitted to him for the purpose of supplying the deficiencies and correcting the errors above indicated."

In Matter of Caroline W. Astor, N. Y. Law Journal, February 3, 1910, Surrogate Cohalan remitted the report of the appraiser. An appeal was taken but dismissed, 137 App. Div. 922, because it was not an order appealable under § 2570 of the Code of Civil Procedure. The opinion of the surrogate stated that the report was remitted for the following reasons:

RECORD SHOULD SHOW THAT APPRAISAL INCLUDES ALL CHATTELS IN THIS STATE.

"The decedent died in October, 1908. The affidavit as to the value of the rugs, furniture and bric-a-brac was made in March, 1909. This affidavit states that deponent made an examination of the contents of the premises No. 842 Fifth Avenue on that date. This affidavit should be supplemented by the affidavit of some one acquainted with the rugs, furniture and bric-a-brac in the premises occupied by the decedent to the effect that the articles mentioned in the affidavit constituted all the furniture, rugs and bric-a-brac belonging to the decedent in this State at the time of her death.

APPRAISALS MUST BE IN AFFIDAVIT FORM.

"The report also contains a statement made by Gorham & Company to the effect that they examined certain silverware at the premises of the decedent. This state-

ment is insufficient; it should be in the form of an affidavit with the qualifications of the appraiser duly stated. It should also be supplemented by an affidavit to the effect that the silverware in question was fully enumerated in the appraisal, and that it was the only silverware left by the decedent in the State of New York at the time of her death.

"The appraisal made by Messrs. Tiffany & Company as to the value of decedent's jewelry should also be in the form of an affidavit instead of a mere statement of the value; the same applies to the statement of Messrs. Duveen Brothers as to the value of the antiques and works of art.

APPRAISALS MUST BE ITEMIZED.

"The affidavit of Caroline S. Wilson as to the value of the LACES, SHAWLS, &c., left by the decedent is insufficient because it does not contain an itemized statement of the value of the various articles on which an aggregate valuation of \$5,000 is placed; secondly, because the affiant does not state her qualifications to make such an appraisal; and in addition to this, she is a party in interest."

THE PRACTICE is to require an affidavit as to the value of the personal property to be made by some competent expert in values of the particular kind of article appraised by him. It may be necessary to submit affidavits of several experts for the reason that the expert must be one who is experienced in values of the particular kind of property concerning which he is deposing. For instance, the decedent may have died possessed of a saloon with a stock of fixtures and liquors, and he also may have died possessed of jewels and precious stones, and also paintings and works of art. In such a case it is necessary to obtain appraisals from men skilled in the particular subject of the property appraised.

NAME AND ARTIST OF PICTURES SHOULD BE GIVEN. In Matter of Kahn, N. Y. Law Journal, March 16, 1912, Surrogate Cohalan remitted the report of the appraiser, saying: "The appraiser failed to insert in the appropriate columns the value placed by him upon the different items constituting the assets of decedent's estate. The executor

alleges in his affidavit that the value of the household furniture, pictures and works of art left by the decedent was the sum of \$5,000. A supplementary affidavit made by Morris Lowenbein and accepted by the transfer tax appraiser gives the value of this property as \$3,022. In Lowenbein's affidavit there is the following item: '11 pictures (in parlor), \$200; 7 pictures (dining room), \$85.' The appraiser should give the title of each of the pictures, and, wherever possible, the name of the artist, and the value of each picture."

THE ARRANGEMENT OF THE ITEMIZED LIST of chattels in the expert's affidavit of appraisal should follow the same order in which they are set out in this schedule. Frequently there will appear in the papers a list of assets several pages long. It is part of the duty of the appraiser to check up the articles in the affidavit to see at what sum the expert has valued them and if they do not follow the same order it entails additional unnecessary labor.

MORTGAGES held by decedent should be included in this schedule. There should be given the names of the parties, the date of the mortgage, a brief designation of the premises mortgaged, the amount of the principal, the interest rate and the interest dates, the place, date, liber and page of recording mortgage. If any amount has been paid on account of the principal of the mortgage, so state, giving date of payment.

ACCRUED INTEREST ON MORTGAGES to date of decedent's death should be calculated by the attorney for the estate, and be separately recited under the principal of the mortgage.

A CLAIM THAT MORTGAGE IS NOT WORTH ITS FACE VALUE should be supported by a very complete statement of facts so that the appraiser can draw his own conclusions as to the value of the mortgage.

ALL CLAIMS in favor of decedent should be included no matter whether the representatives of the estate consider them to be good or bad.

The question of the value of the claims is one to be determined by the appraiser. Give him the facts and let

him draw the conclusions. Do not say that a claim is worthless, but tell why you have reached the conclusion that it is worthless. Calculate the interest, if any, on all claims to date of death of decedent and separately state interest underneath the amount of the claim. If the claim does not carry interest, so state.

PROMISSORY NOTES and other instruments in writing for the payment of money should be set forth by giving date, name of maker, interest rate, date of maturity, and accrued interest to date of decedent's death. If you claim that they are not worth their face value, state in full the reasons for their depreciation.

UNRECORDED OPERATIONS OF THE APPRAISER'S MIND. Surrogate Fowler remitted to the appraiser the report in *Matter of DeWolf*, New York Law Journal, February 24, 1913, saying: "As the only evidence before the appraiser showed that the value of decedent's bills receivable account did not exceed 20% of the face value thereof, the appraiser was not justified in estimating the value of the account at 50% of its face value."

Remember that the affidavits submitted to the appraiser form the record upon which the surrogate passes. If there is no record the surrogate cannot pass upon the unrecorded operations of the appraiser's mind. As was said in *Matter of Kennedy*, 113 App. Div. 4-8, neither the appraiser nor the surrogate is authorized to make "an assessment upon suspicion."

LIFE INSURANCE POLICIES payable to the estate should be listed; give the name of the life insurance company, the number of the policy, and the amounts. *Matter of Knoedler*, 140 N. Y. 377.

WHEN NOT FOR BENEFIT OF ESTATE they are not taxable. Vide *Matter of Parsons*, 117 App. Div. 321-323; *Matter of Elting*, 78 Misc. 692; *Matter of Fay*, 25 id. 468, opinions cited sub Life Insurance, *post*, page 736.

ABSENCE FROM SCHEDULES OF PROPERTY SPECIFIED IN WILL should be explained. When the appraiser sees these articles mentioned in the will, he naturally looks to this Schedule A³ to find them listed. If the decedent did not

die possessed of the articles mentioned in the will, then the representative of the estate should offer an explanation as to why they were not found among the assets of the estate. The executors are under the burden of showing that the property specifically mentioned in the will has not come into their hands, and also of showing they have no knowledge or information on the subject beneficial to the State. Matter of Kennedy, 113 App. Div. 4-9.

If the will was made a short time before the death of decedent, and property specified in the will does not appear among decedent's assets, a very natural enquiry arises as to whether there has not been a transfer subject to the tax under the provisions of subdivision 4 of § 220. This doubt should be anticipated by submission of proof, in affidavit form, of the facts. Vide Matter of Loewi, 75 Misc. 57; Matter of Lawrence, N. Y. Law Journal, February 15, 1913, opinion quoted *post*, page 701.

PROPERTY BELONGING TO ANOTHER FOUND IN SAFE DEPOSIT BOX of decedent renders it necessary for the representatives of the estate of the decedent to explain its presence there. Just what proof may be necessary to establish that the articles in question do not belong to the decedent depends upon the particular circumstances of each individual case. It will not do to make the bald statement that the articles in question did not belong to the decedent. The representative of the estate must go further and establish on the record the reason for their being in the decedent's safe deposit box, and should set forth the facts from which is drawn the conclusion that the property belongs to some one other than the decedent. Matter of Lawrence, *supra*; Matter of Francis, N. Y. Law Journal, August 12, 1913, *supra*, page 749.

As to disputed claims to property vide cases cited *sub* Compromise of Claim and Ownership of Property.

DEBT FORGIVEN BY WILL should be set forth in this Schedule A³ as an asset of the estate. Matter of Wood, 40 Misc. 155. It has been held that if the debtor of the decedent is insolvent that then the worthless debt does not become an asset of the estate by reason of its being

forgiven. *Morgan v. Warner*, 45 App. Div. 424-427, affirmed, on opinion below, 162 N. Y. 612; *Matter of Manning*, 169 N. Y. 449. If the claim is made that the debtor is insolvent then it is incumbent upon the estate to establish the worthlessness of the debt by competent, legal evidence. *Morgan v. Warner*, *post*, page 238.

(4) Schedule A⁴—Corporate stock and bonds.

In this schedule should be set forth all corporate bonds, stocks and securities. This includes joint stock associations. *Matter of Jones*, 172 N. Y. 575. It will be noted that *Matter of Wilmer*, 153 App. Div. 804, affirming 75 Misc. 62, has to do with an estate of a non-resident.

The transfer of stock in foreign corporation is subject to the tax. *Matter of Merriam*, 141 N. Y. 479-485, sustained in 163 U. S. 625, sub nom. *United States v. Perkins*.

THE ACCRUED INTEREST ON THE BONDS to the date of decedent's death should be separately stated. Be careful to give the denomination of the bond, and if the corporation has issued more than one kind of bond, identify the kind of bond owned by the decedent.

Sometimes an examination of the will of the decedent indicates that there is mention of securities which are not included in this Schedule A⁴. An explanation should be given as to why the securities do not appear among the assets of the estate. Vide discussion of subject, *supra*, page 110.

In the case of *listed securities* which are actively dealt in the market value should be set forth. The practice in New York county is to take as the market value the lowest sale price on the day of death. If there was no sale on the day of decedent's death then the price of the lowest sale on the day nearest to the death of decedent provided such sale is not more than a few days either after or before decedent's death.

In the immense volume of business transacted in NEW YORK COUNTY, where millions of dollars of securities are appraised every month of the year, the administration necessities of the office have led to the adoption of this

practice. In New York county it must be remembered that there are, under § 229, an EXAMINER OF VALUES and an assistant examiner of values. When the schedules of assets are filed in the appraisers' office in New York county the examiner of values goes over the securities for the purpose of seeing whether the market values as given are correct in accordance with his judgment. If correct, in his opinion, he checks the value. If the value is not correct he indicates on the office copy of the schedules the valuation which in his opinion is the correct market value. These values so given by the examiner of values are usually accepted by the appraiser unless question is raised by the attorney for the estate or by the attorney for the state comptroller.

At the first hearing before the appraiser the valuations as passed upon by the examiner of values are exhibited to the attorneys so as to give them an opportunity to lodge any objections which they may have. If there are objections, then the examiner of values is placed on the witness stand and an opportunity is given to examine him as to the facts upon which he based his conclusions relative to the values.

This practice of taking the value at the lowest sale price on the day of death has the sanction of usage. However, it would seem that § 122 OF THE DECEDENT ESTATE LAW, formerly § 1, chapter 34, of the Laws of 1891, is the statutory provision which covers the cases of securities customarily bought or sold in open market. This provision reads as follows:

"Whenever by reason of the provisions of any law of this state it shall become necessary to appraise in whole or in part the estate of any deceased person, the persons whose duty it shall be to make such appraisal shall value the real estate at its full and true value, taking into consideration actual sales of neighboring real estate similarly situated during the year immediately preceding the date of such appraisal, if any; and they shall value all such property, stocks, bonds, or securities as are customarily bought or sold in open markets in the city of New York or

elsewhere, for the day on which such appraisal or report may be required, by ascertaining the range of the market and the average of prices as thus found, running through a reasonable period of time." (Renumbered by L. 1909, ch. 240, § 17. Formerly § 120.)

It was held in *Matter of Curtice*, 111 App. Div. 230-233, affirmed, without opinion, 185 N. Y. 543, that said provision of the statute was not applicable to the appraisal of an inactive stock of which there were infrequent sales. Vide cases cited sub *Closely Held Stock*.

In *Matter of Crary*, 31 Misc. 72-73 (1900), the appraiser arrived at the value of the stocks in question by taking the average sales of the same for the three months next prior to decedent's death. Surrogate Arms of Broome county in upholding the appraiser quoted the statute just referred to and said: "The statute which furnished the rule for the appraiser required him to find the 'range of the market * * * running through a reasonable period of time.' In the same statute the Legislature fixed what it evidently considered a reasonable period of time in regard to appraisals of real estate by requiring the appraiser to consider 'actual sales of neighboring real estate similarly situated during the year immediately preceding,' and in my judgment a range of three months for stocks and securities sold in the open market would be a fair and reasonable period as compared with one year on real estate.

"There can be no fixed and inflexible rule applicable to all cases, and an examination of the cases upon this question both prior to and since the enactment of the statute quoted shows that the courts have uniformly approved what seemed to be a reasonable application of the law to the particular case in question, although considerable variation would occur in different cases in regard to the period of time considered, hence it would seem that the determination of the appraiser upon that branch of the case ought not to be disturbed."

THE RULE IN THE KENNEDY CASE. Surrogate Cohalan in remitting the report of the appraiser in *Matter of*

John S. Kennedy, N. Y. Law Journal, March 8, 1911, said: "The appraiser erred in calculating the value of certain comparatively inactive securities at the price bid for them on the day after the date of decedent's death. He should have ascertained the average prices at which the securities were sold within a reasonable time before and after decedent's death and made his calculations upon that basis. He should have ascertained the value of the active securities in the manner prescribed by § 1, chapter 34 of the Laws of 1891 (now § 122 of Decedent Estate Law), and the average price of these securities for a period of two months before and two months after decedent's death would represent the fair market value of these securities at the date of decedent's death (Matter of Crary, 31 Misc. 72). The number of shares of stock held by decedent should not be taken into consideration in ascertaining their value (Matter of Gould, 19 App. Div. 352)." Vide Matter of Chambers, *post*, page 627.

LARGE BLOCKS OF STOCK. In Matter of Chappell, 151 App. Div. 774-775, the court say: "The amount of the stock, the market for it and whether a large block could be sold are elements to be considered in fixing its value." Vide etiam Matter of Proctor, 41 Misc. 79. For contrary doctrine regarding large blocks of stock vide Matter of Jay Gould, 19 App. Div. 352-360, affirmed on this point in 156 N. Y. 423; Matter of Kennedy, *supra*.

In New York county when a question is raised as to the valuation of a stock customarily bought and sold upon the market the rule in the Kennedy case, *supra*, is applied by taking the average price of the securities for a period of two months before and two months after decedent's death. In this connection it should be remembered that the Court of Appeals has held in Matter of Thayer, 193 N. Y. 430-433, that the valuation of stock is a question of fact.

In listing the stock, state the name of the corporation, and if the corporation issues different kinds of stock indicate which kind was held by the decedent, state the par value and what you claim to be the market value.

All stock owned by the decedent, no matter whether of a foreign or domestic corporation is subject to the tax. Subdivisions 1 and 4, § 220 and § 243; *Matter of Merriam*, 141 N. Y. 479-495. This is so even though the corporation holds all of its property outside the state of New York. *Matter of Palmer*, 183 N. Y. 238. The cases of *Matter of Cooley*, 186 N. Y. 220, and *Matter of Thayer*, 193 N. Y. 430, both deal with an estate of a non-resident.

The stock is taxable even though it stands in the name of another provided it in reality belongs to the decedent. As, for instance, if stock was being carried in the name of his brokers. The fact that it was not in his name does not alter the situation. *Matter of Newcomb*, 71 App. Div. 606, affirmed, on opinion below, 172 N. Y. 608.

As to SECURITIES PLEDGED AS COLLATERAL, vide cases cited sub Pledged Securities. The practice is to place the list of pledged securities in this Schedule A⁴ calling attention to the fact that the securities were pledged at the date of decedent's death, and that the amount for which they are pledged is set forth under Schedule B³ containing the list of the debts of decedent.

An affirmative statement should be made that the securities so given are the same securities for which the debt is set forth under B³. Suppose that there are listed in A⁴ one hundred shares of the stock of the New York Central & Hudson River Railroad Company without any further comment, and that in B³ there appears an item of five thousand dollars indebtedness to a broker's firm, the collateral being one hundred shares of the New York Central & Hudson River Railroad Company stock. There is nothing but an inference to connect these two items. It might be that the decedent owned two hundred shares of stock in this corporation, one hundred shares of which he listed under A⁴ and the other hundred shares he had come to the conclusion should not be listed under A⁴ because they were collateral for the debt mentioned in B³.

If the stock is owned jointly with another, set it forth in Schedule E, not in Schedule A⁴.

REAL ESTATE CORPORATION. The method employed in arriving at the value of stock in a real estate corporation whose stock has no market value in the ordinary acceptation of the word, is to require each separate piece of real estate owned by the corporation to be appraised by a competent real estate expert. The valuation of the real estate of the corporation must be made with the same particularity as the valuation of real estate of decedent. Vide discussion sub Schedule A¹.

The subject of **UNLISTED SECURITIES** is treated sub Closely Held Stock.

(5) Schedule A⁵—Interest of decedent in any co-partnership or business

In this schedule should be set forth the interest of decedent at the time of his death in any co-partnership or business, stating the nature and location thereof, the total capital employed, the gross profits, expenses and net profits of the business for *at least* three years prior to decedent's death, and any other facts pertaining to such business as may be pertinent to a fair and just appraisal of decedent's interest in said business and the good-will thereof.

If the decedent was not interested in any co-partnership or business, make an affirmative statement to that effect and state what the occupation of decedent was at the time of death.

It is the practice to ask that there shall be submitted to the appraiser a **CERTIFICATE OF A COMPETENT ACCOUNTANT** showing the amount of the decedent's interest in the said business and the good-will thereof. The subject of good-will is treated sub Good Will.

In *Matter of Friedlander*, N. Y. Law Journal, March 8, 1911, Surrogate Cohalan remitted the report to the appraiser, saying: "The appraiser's report contains no competent evidence as to the value of the merchandise owned by the decedent at the date of his death. This should be shown by an affidavit of the person who made the inventory of the merchandise immediately after

decedent's death, and such an affidavit should contain a detailed statement showing what the merchandise consisted of and its market value at that time.

"The value of the accounts receivable should be determined from the business books of the decedent, supplemented with the evidence of the individual who had charge of the collection of these accounts. As it appears from the testimony before the appraiser that the decedent's books are in the possession of the attorney for the executor, there is no reason why they should not be taken before the appraiser or submitted to an accountant appointed by him for the purpose of ascertaining the value of decedent's business."

The importance of making the record full and complete as to the assets and liabilities going to make up the value of interests of decedent in any co-partnership or business cannot be emphasized too strongly. If the appraiser does not have before him a sufficient record it is apparent that the surrogate cannot pass upon the matter when the report of the appraiser comes before him under § 231.

In *Matter of Achelis*, N. Y. Law Journal, March 9, 1912, in remitting the report to the appraiser, Surrogate Fowler said: "The affidavits submitted as to the value of decedent's interest in the partnership business of Frederick Viotor & Achelis are insufficient, as they do not allege that the items therein mentioned are taken from the books of the company, or that the statement is a correct transcript of the books of the company showing the value of decedent's interest in the partnership."

It is the better practice to furnish at the outset statements of expert accountants, and if these are not sufficient to enable the appraiser to form a judgment as to the value of the interest of the decedent in the business, then hearings will be had at which testimony will be taken.

It is not sufficient to state what the interest amounts to. The detailed figures should be given. The appraiser's report was remitted to him in *Matter of Moses Kahn*, N. Y. Law Journal, March 16, 1912, Surrogate Cohalan saying: "It is alleged in the affidavit of Louis Kahn that

the sum of \$674,679.95 represents the total amount of notes received by the executors of the estate for decedent's interest in the firm of L. & M. Kahn & Company, but there is no evidence as to the value of this interest. The appraiser should have taken the testimony of some competent witness who examined the books of the company and could testify as to the actual value of decedent's interest in the firm."

Sometimes attorneys refuse to give the information in this form and insist that the value of the interest be developed entirely by testimony taken at the hearings. While attorneys may be within their right in demanding such a procedure it usually is not the most expeditious method. It sometimes resolves itself into a long controversy involving figures which might have been avoided if a proper statement had been filed in the first instance.

ASSETS OF A CO-PARTNERSHIP NOT WITHIN STATE. This question has not been passed upon in any reported decision. A ruling was made by the state comptroller in Matter of Dusenberry, Cattaraugus County, under date of May 13, 1913 (2 State Department Reports, 501). The opinion is as follows:

"Replying to your favor of the fifth inst. relative to the appraisal of the above estate for transfer tax purposes, I note your statement that this decedent at the time of his death was interested in a copartnership under the firm name of Wheeler & Dusenberry; that the business was carried on at Endeavor, Forrest county, Penn., and consisted of real property, standing timber, cut timber and a mill site, used in carrying on a lumber business, and that the executors of the estate claim that the decedent's interest in this business is not taxable, for the reason that it is *tangible* property without the state of New York.

"It is true that chapter 732 of the Laws of 1911 defines the terms 'tangible' and 'intangible' as applied to the property of a decedent, for transfer tax purposes.

"Subdivision 1 of § 220 of the Tax Law as amended by chapter 732 of the Laws of 1911, reads as follows:

"1. When the transfer is by will or by the intestate laws

of this state of any *intangible* property, or of *tangible* property within the state, from any person dying seized or possessed thereof while a resident of the state.

“It is apparent from this provision that *tangible* property, whether real or personal, when owned by a resident of this state *must be within this state* at the time of the owner's death in order to be liable to taxation when transferred by will or intestacy.

“*Tangible* property is defined by § 243 of the Tax Law as follows:

“The words ‘tangible property’ as used in this article shall be taken to mean corporeal property such as real estate and goods, wares and merchandise, and shall not be taken to mean money, deposits in bank, shares of stock, bonds, notes, credits or evidences of an interest in property and evidences of debt.

“If this decedent's interest in the copartnership in the State of Pennsylvania is ‘real estate’ or ‘goods, wares and merchandise,’ then undoubtedly the executors' contention that no transfer tax can be assessed thereon is correct. If, however, the decedent's interest in the co-partnership is not ‘tangible property’ as defined above, but is ‘intangible’ property, then it is clearly liable to taxation, because subdivision 1 of § 220 above quoted, does not require ‘intangible property’ of a resident decedent to be in this state *at the time of his death* in order to be liable to taxation under article X of the Tax Law.

“*Intangible* property is defined by § 243 of the Tax Law as follows:

“The words ‘intangible property’ as used in this article shall be taken to mean incorporeal property, including money, deposits in bank, shares of stock, bonds, notes, credits, evidences of an interest in property and evidences of debt.

“In view of the definitions of ‘tangible’ and ‘intangible’ property as applied to subdivision 1 of § 220, the first question to be considered is whether the decedent's interest in this property is *corporeal* or *incorporeal* property.

“The courts of this state have held that the title to part-

nership property, upon the death of one partner, vests in the surviving partner, and all that the executor of the deceased partner has or can claim is the equitable interest in any *surplus* that remains after the partnership affairs are liquidated. *Williams v. Whedon*, 109 N. Y. 333; *Russell v. McCall*, 141 id. 437-350; *Preston v. Fitch*, 137 id. 41-56; *Menagh v. Whitehall*, 52 id. 146-158; *Secor v. Tradesmen's National Bank*, 92 App. Div. 294.

"In view of these decisions the executors of this estate cannot point to any 'tangible' property of the copartnership in the state of Pennsylvania as belonging to the decedent. The decedent's interest in this copartnership property, at most, is a mere *chose in action*, the situs of which follows the residence of the deceased partner, and as such is clearly *intangible* property.

"The department is therefore of the opinion that you should insist upon the decedent's interest in this copartnership property being appraised as a part of his estate, the transfer of which is liable to taxation under the will of said decedent."

Vide *Matter of Straus*, N. Y. Law Journal, October 9, 1911, opinion quoted *post*, page 752.

(6) Schedule A⁶—Property not included in other schedules

In this schedule should be set forth any property left by decedent of whatever kind and nature not included in the foregoing schedules or in Schedule E. This does not mean property passing by power of appointment for such property should be set forth in Schedule C.

It sometimes happens that the decedent is entitled to a vested interest in an estate, which vested interest is subject to the interest of a life tenant. The transfer of the vested interest in such a case is subject to the tax. *Matter of Otto Huber*, 86 App. Div. 458-463. If an interest of this kind exists, the date of birth of the life tenant should be given so that the remainder value of decedent's interest may be calculated by the superintendent of insurance under the provisions of the third paragraph of § 230.

There should be set out an itemized statement of the assets of the estate in which decedent had the remainder interest. These assets must be given with the same particularity as though they were the assets of the estate of the decedent. The reason for this is plain because the appraiser cannot value the remainder unless he has the record complete as to the nature and character of the assets composing the estate. The result is that sometimes there is an appraisal of an estate within an appraisal of an estate, and often the appraisal of this remainder interest is much more of an undertaking than the appraisal of the estate proper of the decedent. In the case of such a remainder interest there should be annexed to this Schedule A⁶ a copy of the will or other instrument creating the estate.

As to interest of a decedent in the estate of another decedent, vide *Matter of Gans*, N. Y. Law Journal, April 13, 1912, *post*, page 862; *Matter of Sterry*, id., April 30, 1912, *post*, page 862; *Matter of de Sala*, id., July 20, 1912, *post*, page 860.

(7) Schedule C—Property passing by decedent's exercise of any power of appointment

Under this schedule should be listed all property the transfer of which is taxable under the provisions of subdivision 6, of § 220. *Matter of Vanderbilt*, 50 App. Div. 246, affirmed, on opinion below, 163 N. Y. 597; *Matter of Delano*, 176 N. Y. 486, sustained in 205 U. S. 466; *Matter of Cooksey*, 182 N. Y. 92; *Matter of Stuart*, N. Y. Law Journal, May 10, 1913, opinion quoted *post*, page 772. As to attempted exercise of power of appointment vide *Matter of Lansing*, 182 N. Y. 238; *Matter of Ripley*, 192 N. Y. 536; *People ex rel. Ripley v. Williams*, 69 Misc. 402; *Matter of Spencer*, 119 App. Div. 883, affirmed, 193 N. Y. 613; *Matter of Haight*, 152 App. Div. 228.

As to right of election to take under original will vide *Matter of Warren*, 62 Misc. 444-448; *Matter of Chapman*, 133 App. Div. 337-340, affirmed, 199 N. Y. 562; *Matter of Mitchill*, N. Y. Law Journal, November 22, 1913, opinion quoted, *post*, page 777.

There should be set out all the assets in the same manner as required when decedent has interest in another estate, vide *supra*, page 121.

(8) Schedule E—Property held in trust for or jointly with others

It is the practice in some counties to set forth such assets under Schedule A³, but it tends to clearness to include them in a separate schedule.

Even at the danger of reiterating there should be emphasized the necessity of giving the full facts from which the appraiser can reach his conclusion. An examination of the decisions will aid the practitioner in determining how to present the facts of the particular case in hand. They have been collated *post*, page 787.

PROCEDURE

THE SCHEDULES OF DEDUCTIONS

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|--|--|
| (1) Schedule B ¹ —Funeral expenses.
Tombstone.
Cemetery plot. | Inheritance tax imposed by foreign state. |
| (2) Schedule B ² —Administration expenses.
Estimated expenses.
Counsel fees.
Litigation.
Commissions of executor or administrator.
Full commissions.
Devises and bequests in lieu of commissions.
When commissions not allowed.
Temporary administrator's commissions.
Trustee's commissions.
Broker's commissions. | (3) Schedule B ³ —Debts of decedent.
Debts which are allowable.
Doubtful claims.
Promissory notes.
Claims barred by the statute of limitations.
Unexpired lease.
Claim of executor or administrator.
Debts due to members of decedent's family.
Personal taxes. |
| | (4) Schedule B ⁴ —Deductions claimed and not included in the preceding sub-schedules. |

(1) Schedule B ¹—Funeral expenses

Under this schedule should be inserted all the funeral expenses.

Surrogate Church in Matter of Liss, 39 Misc. 123-124, very clearly expresses the rule for the allowance of such expenses. The surrogate said: "If the funeral expenses are manifestly improper, so that on an accounting of an executor or administrator, the executor or administrator would not be permitted to charge for the same, the mere fact that the executor has expended that amount is not sufficient to justify this deduction, but, if it is a reasonable expense, then it should be deducted."

There should be set forth under this schedule the undertaker's bill, the expense of advertising death notice, and the expense of the funeral service.

COST OF TOMBSTONE will be allowed as a deduction.

Matter of Edgerton, 35 App. Div. 125, affirmed, without opinion, 158 N. Y. 671; Matter of Maverick, 135 App. Div. 44, affirmed, without opinion, 198 N. Y. 618; Code of Civ. Pro., § 2749.

It is the practice to require an affirmative statement that the tombstone has been contracted for or actually paid for. In some religious sects it is the custom not to erect a tombstone for a year after decedent's death. In such a case the schedule should contain a statement showing how the representatives of the estate have arrived at the amount demanded as a deduction.

CEMETERY LOT purchased for the interment of the decedent is a proper deduction. A bequest for care of burial plot is exempt. Matter of Maverick, *supra*.

(2) Schedule B²—Administration expenses

Under this head should be set forth the expenses of administration which include the counsel fees and disbursements necessary in the administration of the estate. Matter of Westurn, 152 N. Y. 93-102; Matter of Purdy, 24 Misc. 301.

"EVERY JUST AND PROPER DISBURSEMENT made by an executor or administrator," said Surrogate Thomas in Matter of Thomas, 39 Misc. 223-225, "as a necessary or proper expense of administration, to which the executor or administrator will be entitled to be credited on his accounting with his *cestui que trust*, must also be credited in appraising the values of the interests transferred to those *cestui que trust* for purposes of taxation."

EXPENSES MAY BE ESTIMATED. In Matter of Jay Gould, 19 App. Div. 352-359 (affirmed as to this point in 156 N. Y. 423-428), the court in allowing estimated expenses of administration said: "It has for many years been the practice in the city of New York to arrive at the amount of expenses of the administration to be deducted in these proceedings in this manner, and we see no objection to it. There is no suggestion made that the estimate is too large." To same effect Matter of Granfield, 79 Misc. 374-376.

A reasonable sum for administration expenses will be allowed as a matter of course. Do not include therein the commissions of executor, administrator or trustee. These items will be calculated and allowed by appraiser. If the estimate is out of proportion to the size and nature of the estate the appraiser will call for the basis upon which it has been made.

COUNSEL FEES to an equitable amount will be allowed as a deduction. If the counsel fees claimed are larger than usually charged for an estate of the character under consideration, an affidavit should be presented giving the reason for the charge.

In Matter of Thomas, 39 Misc. 223-226, the appraiser refused to allow the deduction of counsel fees asked. Upon an appeal to surrogate the report was remitted for further hearing, the surrogate saying: "The evidence as to these matters, contained in the record, is exceedingly meagre and unsatisfactory."

EXPENSES OF LITIGATION. Surrogate Davie of Catteraugus County in Matter of Sanford, 66 Misc. 395-399, succinctly sums up the principles of the decisions in saying: "It may be stated, as a general rule, that expenses of litigation in conserving and preserving the *corpus* of the estate are proper deductions before assessment of the tax; but the expense of litigation between distributees over their respective interests, which does not in any manner affect the size or the amount of the estate originally passing, should not be so deducted." Vide etiam Matter of Thrall, 30 App. Div. 271-274, affirmed as to this point, 157 N. Y. 46; Matter of Gihon, 169 N. Y. 443-445.

COMMISSIONS OF EXECUTOR OR ADMINISTRATOR. "In ascertaining the value of an estate for the purpose of the transfer tax," said Surrogate Fowler in Matter of Stephen Van Rensselaer, N. Y. Law Journal, October 11, 1912, "the appraiser should deduct from the assets of the estate the commissions which may be allowed to an executor or administrator (Matter of Westurn, 152 N. Y. 93; Matter of Gihon, 169 N. Y. 443). While the exact amount of such commissions cannot be ascertained until the ju-

dicial settlement of the account, it is usually necessary, in order to avoid the penalty imposed by the Transfer Tax Law, that the tax should be assessed before the final accounting, and the appraiser is therefore obliged to calculate the commissions of the executor from the value of the estate appraised by him and to deduct the amount so ascertained from the assets of the estate. This practice was approved by the Court of Appeals in the Matter of Westurn (*supra*)."

It is not necessary to calculate and set forth the amount of the commissions, as the computation will be made by the appraiser and allowed.

FULL COMMISSIONS TO EACH OF THREE EXECUTORS, under § 2730 of Code of Civil Procedure, allowed as a deduction by Surrogate Ketcham in Matter of Van Pelt, 63 Misc. 616, where the estate at the time of death of testator was of the value of \$98,621.33, but when the executors received their letters it had been increased by accrual of interest to more than \$100,000. "No doubt, for the purpose of the transfer tax, the estate must be valued as of the time of death; but whether each executor shall receive a full commission is to be determined by the value of the estate which they shall have administered."

COMMISSIONS ALLOWED ON REAL PROPERTY where will provides for sale of real estate. Matter of Saunders, 77 Misc. 54-67, affirmed, without opinion, 156 App. Div. 891.

DEVISES AND BEQUESTS IN LIEU OF COMMISSIONS. "The excess in value of the property so bequeathed or devised above the amount of commissions or allowances prescribed by law in similar cases shall be taxable under this article." Section 226.

Commissions allowed by law were given to an executor and trustee, and in addition an annuity of \$1,500 for his services "legal or otherwise," as long as he continued to act as executor and trustee. *Held*, that the annuity was subject to tax. Matter of Huber, 86 App. Div. 458-459.

EXECUTOR'S COMMISSIONS NOT DEDUCTED when will provides that they shall act without compensation. Sur-

rogate Cohalan in *Matter of Neustadter*, N. Y. Law Journal, August 16, 1913, said: "Ordinarily the commissions of executors and trustees are properly deducted from the assets of an estate, but the testatrix in paragraph thirtieth of her will provided that 'my executors and trustees herein named shall not charge or receive any compensation or commissions in connection with the discharge of their duties as such.'

"The executors could have refused to qualify, and it would then be incumbent upon the court to appoint an administrator c. t. a. who would be entitled to the commissions prescribed by statute; but as the executors named in the will have qualified, and as their right to the office of executors is derived from the provisions of the will, which also provides that as such executors and trustees they shall not be entitled to compensation, their acceptance of the position of executor and trustee acts as a waiver of their right to the commissions prescribed by statute." To same effect *Matter of Cornelius Vanderbilt*, 68 App. Div. 27-30, modified as to other points, 172 N. Y. 69.

COMMISSIONERS NOT ALLOWED ON SPECIFIC BEQUESTS. In *Matter of John A. Singer*, N. Y. Law Journal, November 22, 1912, Surrogate Cohalan said: "If the securities constituting the assets of the estate are specifically bequeathed the executors would not be entitled to commissions upon such bequests (*Matter of Robinson*, 37 Misc. 336; *Matter of Kings County Trust Co.*, 69 Misc. 531); but if the securities, although not specifically bequeathed, were accepted by the legatees in satisfaction of their legacies, the executors would be entitled to full commissions (*Matter of Curtiss*, 9 App. Div. 285)."

TEMPORARY ADMINISTRATOR'S COMMISSIONS are allowed. *Matter of Gihon*, 169 N. Y. 443-445; *Matter of Hurst*, 111 App. Div. 460.

TRUSTEES' COMMISSIONS are proper deductions. *Matter of Silliman*, 79 App. Div. 98, affirmed, without opinion, 175 N. Y. 513; *Matter of Shields*, 68 Misc. 264-267.

BROKERS' COMMISSIONS for sale of real estate are held

to be proper deductions if the sale of the real estate was necessary for the administration of the estate and the commissions have been paid. If sale has not taken place and it is established on the record that they are actually to be paid, the deduction will be allowed. *Matter of Rothschild*, 63 Misc. 615; *Matter of Shields*, 68 id. 264-267; *Matter of Saunders*, 77 id. 54-68, affirmed, without opinion, 156 App. Div. 891; *Matter of Dormitzer*, N. Y. Law Journal, February 6, 1913.

INHERITANCE TAX IMPOSED BY A FOREIGN STATE upon the succession to property located in such state will not be allowed as a deduction. *Matter of Kennedy*, 20 Misc. 531; *Matter of Penfold*, 81 Misc. 598; *Matter of Burr*, 16 Misc. 89-91.

(3) Schedule B³—Debts of decedent

This schedule should set forth all the debts of and claims against the decedent.

Recite which have been paid or allowed. If any claims have been rejected recount which they are, and disclose the status of each rejected claim.

PARTNERSHIP OR BUSINESS DEBTS should be set forth in Schedule A⁵, not in Schedule B³.

MORTGAGES belong in Schedule A¹, not in this schedule.

"DEBTS WHICH ARE ALLOWABLE," said Surrogate Fitzgerald, New York County, in *Matter of Alexander J. Wormser*, 36 Misc. 434 (1901), "as a deduction from the taxable estate are only such as could have been enforced against the estate if payment had been resisted. *Matter of Gould*, 19 App. Div. 352. While it has been held in other counties that an appraiser cannot hear evidence in regard to the debts of the deceased, funeral expenses and expenses of administration, but that deductions therefor must be made by the surrogate (*Matter of Millward*, 6 Misc. 425; *Matter of Ludlow*, 4 id. 594), it has always been the practice in this county for the appraiser to receive such evidence as might be submitted to him to establish claims for deduction, and his conclusions have been adopted by the court, unless objection was made thereto

or they were palpably improper. This method of procedure has manifest advantages, and I see no reason for changing it.

"In this proceeding, practically no evidence was introduced before the appraiser to sustain the very large deduction made for alleged debts, notwithstanding the assets amounted to more than eight hundred thousand dollars, and the allowances reduced the estate below the taxable limit. The matter will be remitted to the appraiser to receive such proof as may be offered as to the deductions claimed."

It is now the general practice for the appraiser to receive the evidence relative to deductions and to include them in his report to the surrogate made under the fourth sentence of § 230. The name of the creditor, the amount of the debt and a brief description of the nature of the indebtedness should be given.

As a matter of practice the appraiser runs down the list of deductions asked, and if any item appears to require further explanation a supplemental affidavit will be requested. The practitioner will do well to anticipate questions by including in his original papers an explanation of such items as are not the ordinary debts of a person in the station of life of the decedent.

If the DOCTORS' BILLS are of any magnitude, give an explanation. As for instance, that decedent had long illness; or that decedent underwent an operation.

Substantial deductions are sometimes sought for nurse's bills. The natural inquiry is, why were such bills allowed to run for more than a few weeks prior to decedent's death.

In *Matter of Friedlander*, N. Y. Law Journal, March 8, 1911, the surrogate remitted the appraiser's report because it did not "show the various items of indebtedness which he allows as a deduction from the decedent's estate."

In *Matter of Arens*, N. Y. Law Journal, March 9, 1912, the surrogate in remitting the report said: "The executrix of his estate alleges that the decedent owed F. C. Kirchhoff the sum of \$34,000, and the appraiser deducted

this amount from the assets of the estate. * * * No collateral having been given by the decedent to secure payment for this indebtedness, the appraiser should have taken testimony as to the circumstances under which the indebtedness was incurred by the decedent. The appraiser's report will be remitted to him for further testimony as indicated."

CLAIMS OF A DOUBTFUL AND UNCERTAIN CHARACTER should not be allowed by the appraiser. There should be a recital in the appraiser's report, and also in the order fixing tax that the question of the deduction is postponed until the determination of the claim. *Matter of Rice*, 56 App. Div. 253; *Matter of Dimon*, 82 App. Div. 107.

Appraiser refused to allow deduction for alleged claim, the only evidence presented being an affidavit of an attorney that he had advised claimant that he was entitled to the claim. The court held, "there was no proper evidence of the existence of the claim, and nothing upon which a deduction for it could be allowed." *Matter of Simon Wormser*, 51 App. Div. 441-445.

WHERE ESTATE HAS INDEMNITY for claim against it the indemnity should be taken into consideration by the appraiser in determining whether deduction should be made for claim. *Matter of Skinner*, 106 App. Div. 217-219.

PROMISSORY NOTES. It is the practice to ask that copies of promissory notes be annexed to the papers.

CLAIMS BARRED BY THE STATUTE OF LIMITATIONS are not allowed as deductions. The theory is that the state is an interested party, and deductions should not be allowed to reduce the taxable assets even though the outlawed claims are paid by the estate. There does not seem to be a reported decision on this subject in a transfer tax case. It is the practice, however, for the appraiser to disallow deductions based on claims barred by the statute of limitations. For decisions on the general subject vide *Bloodgood v. Bruen*, 8 N. Y. 362; *McLaren v. McMartin*, 36 id. 88; *Butler v. Johnson*, 111 id. 204; *Schutz v. Morette*, 146 id. 137; *Holly v. Gibbons*, 176 id.

520; *Hamlin v. Smith*, 72 App. Div. 601. Where "transaction amounted to a trust," vide *Matter of Frazer*, 92 N. Y. 239-248.

UNEXPIRED LEASE. The liability for the unexpired term of a lease made by decedent should have offset against it the rental received or to be received by estate for the use of the premises since death of decedent. If the premises have not been leased a statement should be made showing what effort had been made to dispose of the lease, and also what use has been made of the premises since decedent's death.

STORAGE BILLS sometimes appear in Schedule B³, but the assets stored are not reflected in Schedule A³. The practitioner should forestall the enquiry which such an entry is sure to bring.

DEBT OR CLAIM OF EXECUTOR OR ADMINISTRATOR will be given the same close examination as required upon the proof of such claims under the provisions of § 2719 of the Code of Civil Procedure.

DEBTS DUE TO MEMBERS OF DECEDENT'S FAMILY are scrutinized by the appraiser with care, and the particulars of the transaction must be set forth.

REAL ESTATE TAXES, water rates or assessments should be set forth in Schedule A¹, not in B³.

PERSONAL TAXES assessed against decedent prior to his death are proper deductions. Vide *Matter of Dormitzer*, N. Y. Law Journal, February 6, 1913, and other cases cited sub Taxes. In making claim for deduction of personal taxes state the year for which taxes were assessed.

(4) Schedule B⁴—Deductions claimed and not included in the preceding sub schedules.

The three preceding sub schedules of deductions are designed to include all deductions ordinarily arising in an estate, and this Schedule B⁴ is intended for such claims, if any, as may not come within the terms of the preceding sub schedules.

NON-RESIDENT ESTATES

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|---|--|
| (1) Only tangible property within state. | (17) Order appointing appraiser. |
| (2) Exercise of power of appointment. | (18) Affidavit for appraisal. |
| (3) Definition of tangible property. | (19) Question of residence. |
| (4) 1911 amendment. | (20) Property transiently in state. |
| (5) Decisions prior to 1911 amendment. | (21) Appraisal by experts. |
| (6) 1911 amendment not retro-active. | (22) Debts due resident creditors. |
| (7) Even money not subject to tax. | (23) Foreign debts and administration expenses. |
| (8) Double taxation. | (24) Pro rata deductions. |
| (9) Consent under § 227. | (25) Cannot compel disclosure of non-taxable assets. |
| (10) Form of application for consent. | (26) New York taxable portion determines tax. |
| (11) When tangible property within state. | (27) Graded rates of tax. |
| (12) Issuance of letters not condition precedent. | (28) Cannot marshal assets to avoid tax. |
| (13) Jurisdiction of surrogate. | (29) Specifically bequeathed or devised property. |
| (14) Code provisions. | (30) Report where property specifically devised. |
| (15) Concurrent jurisdiction. | (31) Order entered thereon. |
| (16) Petition for appointment of appraiser. | |

(1) Only tangible property within State

The only property of a non-resident the transfer of which is subject to the tax is tangible property within the state at the time of the transfer. Subdivisions 2 and 4 of § 220.

(2) Exercise of power of appointment

As to provisions of subdivision 6 of § 220 vide discussion sub Power of Appointment, *post*, page 781.

(3) Definition of tangible property

"The words 'tangible property' as used in this article shall be taken to mean corporeal property such as real estate and goods, wares and merchandise, and shall not be

taken to mean money, deposits in bank, shares of stock, bonds, notes, credits or evidences of an interest in property and evidences of debt. The words 'intangible property' as used in this article shall be taken to mean incorporeal property, including money, deposits in bank, shares of stock, bonds, notes, credits, evidences of an interest in property and evidences of debt." Section 243; Matter of Dusenberry, 2 State Department Reports, 501, opinion quoted *supra*, page 119.

(4) 1911 amendment

If the transfer of the property was made prior to the Amendment by Laws of 1911, chap. 732, in effect July 21, 1911, the statute in force at the time of the transfer should be consulted. Vide Prior Statutes, *post*, page 403.

The last sentence of the present § 243 was added by the 1911 amendment; vide *supra*, page 36, for discussion of its effect in non-resident estate.

(5) Decisions prior to 1911 amendment

The decisions upon transfers made prior to the 1911 amendment are in many instances applicable to the present law except that the transfer of property subject to the tax is now restricted to tangible property within the state. These decisions have been collated, *post*, page 745.

(6) 1911 amendment not retroactive

The 1911 amendment was not retroactive. Matter of Abraham, 151 App. Div. 441; Matter of Webber, *id.* 539; Matter of Niles, N. Y. Law Journal, January 5, 1912; Matter of Bolton, 157 App. Div. 935, appeal pending.

Etiam Matter of Miller, 110 N. Y. 216-223; Matter of Enston, 113 *id.* 174-183; Matter of Van Kleeck, 121 *id.* 701-703; Matter of Davis, 149 *id.* 539-545; Matter of Sloane, 154 *id.* 109-113; Matter of Pettit, 65 App. Div. 30, affirmed, on opinion below, 171 N. Y. 654.

(7) Even money not subject to tax

The 1911 amendment works a complete reversal of the former policy of the statute, and, as if for good measure,

it will be noticed that the legislature has defined (§ 243) money as not "tangible" within the meaning and intentment of § 220, and therefore although the money is in the state at the time of the transfer, the transfer thereof is not taxable in a non-resident's estate.

(8) Double taxation

A substantial step has been taken in the direction of avoiding double taxation, for there is now done away with the former rule of taxing transfers in a non-resident estate of deposits in New York banks (Matter of Blackstone, 171 N. Y. 682, sustained in 188 U. S. 189 sub nom. Blackstone v. Miller), shares of stock in New York corporations (Matter of Palmer, 183 N. Y. 238), bonds physically present in this state (Matter of Morgan, 150 N. Y. 35), and debts due from New York debtors (Matter of Daly, 100 App. Div. 373, affirmed, without opinion, 182 N. Y. 524; Matter of Page, N. Y. Law Journal, April 13, 1912, opinion quoted sub Chose in Action, *post*, page 610).

The 1911 amendment does not completely restore the doctrine of *mobilia personam sequuntur* because tangible personal property within the state is still subject to the tax.

(9) Consent under § 227

Notwithstanding the fact that intangible property of a non-resident decedent is not subject to the tax it is sometimes the practice of New York corporations to ask for a consent from the New York state comptroller under § 227. As the transfer of intangible property of a non-resident is not subject to the tax it is not necessary to obtain the consent. *Dunham v. City Trust Company*, 115 App. Div. 584, affirmed, without opinion, 193 N. Y. 642.

However, if there is any question as to the transfer the simplest method is to apply for a consent, which will be issued forthwith upon an application being made either to the attorney for the state comptroller or to the comptroller's office in Albany.

A consent under § 227 is usually insisted upon for the

reason that the corporation or individual having in possession or control the asset does not care to assume the responsibility of passing upon the question of decedent's residence.

(10) Form of application for consent

The following form is used in some of the counties:

SURROGATES' COURT, NEW YORK COUNTY.

In the Matter of the Transfer
Tax upon the Estate of
JOHN DOE,
Deceased.

*Affidavit upon Application
for Consent under § 227.*

STATE OF NEW JERSEY, }
COUNTY OF MONMOUTH, } ss.:

Henry Smith, being duly sworn, deposes and says:

I. That he resides at Locust, Monmouth County, State of New Jersey.

II. That said decedent died on the first day of September, 1913, a resident of Locust, State of New Jersey, testate, and letters testamentary were issued on the 18th day of September, 1913, by the Surrogate of the County of Monmouth, State of New Jersey. A true and complete copy of the last will and testament is hereto annexed.

III. That deponent was appointed executor of this estate, has qualified and is now acting as such executor.

IV. That the decedent died seized and possessed of no real estate in the State of New York, and no tangible, corporeal personal property within the State of New York, and that none passed at decedent's death by virtue of power of appointment exercised by decedent.*

V. That the following are the names, relationship and amount of interest of the persons among whom this estate is distributable:

<i>Name and Relationship</i>	<i>Address</i>	<i>Amount of Interest</i>
Mary Doe, widow,	Locust, New Jersey,	one-half
Henry Doe, son,	Locust, New Jersey,	one-quarter
Susan Doe, daughter,	Locust, New Jersey,	one-quarter

That this affidavit is made for the purpose of securing the waivers of the Comptroller of the State of New York to transfer

the following property owned by this decedent at the date of his death or in which this decedent had an interest:

One hundred (100) shares of stock of New York Central Railroad Company.

Deposit in Bank for Savings, book No. 604,324, \$643.24 and interest.

HENRY SMITH.

Sworn to before me this

25th day of September, 1913.

PETER JACKSON

Notary Public,

Monmouth County.

Attach county clerk's certificate

* If there was transferred real estate in the state of New York, or tangible personal property within the state, then add to this paragraph IV the words "except as set forth in Schedule A hereto annexed," and annex to the affidavit a schedule showing the real estate and the tangible personal property within the state.

If there is to be a formal appraisal it is suggested that there be used the form set forth *post*, page 143.

(11) When tangible property within state

If there has been a transfer of tangible property within the state coming under the terms of § 220 then an appraisal thereof should be had.

(12) Issuance of letters not condition precedent

It is not necessary that letters be issued in this state or elsewhere to give the surrogate jurisdiction to impose the tax. Matter of Edgerton, 35 App. Div. 125, affirmed, without opinion, 158 N. Y. 671; Matter of Fitch, 160 N. Y. 87; Matter of Pullman, 46 App. Div. 574; Matter of Arnold, 114 App. Div. 244; 2 State Department Reports, 497-499.

(13) Jurisdiction of surrogate

The question which arises at the outset is as to the county in which the proceedings shall be brought. This is governed by the first sentence of § 228 which provides that "the surrogate's court of every county of the state

having jurisdiction to grant letters testamentary or of administration upon the estate of a decedent whose property is chargeable with any tax under this article, or to appoint a trustee of such estate or any part thereof, or to give ancillary letters thereon, shall have jurisdiction to hear and determine all questions arising under the provisions of this article, and to do any act in relation thereto authorized by law to be done by a surrogate in other matters or proceedings coming within his jurisdiction; and if two or more surrogates' courts shall be entitled to exercise any such jurisdiction, the surrogate first acquiring jurisdiction hereunder shall retain the same to the exclusion of every other surrogate."

JURISDICTION OF SURROGATE NOT LOST to appoint appraiser and to assess tax because executors of non-resident estate have removed assets from this state and distributed them. *Matter of Hubbard*, 21 Misc. 566.

(14) Code Provisions

The Code of Civil Procedure by § 2476 provides that in non-resident estates "the surrogate's court of each county has jurisdiction, exclusive of every other surrogate's court" in either of the three following cases:

"2. Where the decedent, not being a resident of the State, died within that county, leaving personal property within the State, or leaving personal property which has, since his death, come into the State, and remains unadministered.

"3. Where the decedent, not being a resident of the State, died without the State, leaving personal property within that county, and no other; or leaving personal property which has, since his death, come into that county, and no other, and remains unadministered.

"4. Where the decedent was not, at the time of his death, a resident of the State, and a petition for probate of his will, or for a grant of letters of administration, under subdivision second or third of this section, has not been filed in any surrogate's court; but real property of the decedent, to which the will relates, or which is subject to

disposition under title fifth of this chapter, is situated within that county and no other."

Matter of Lowndes, 60 Misc. 506-507.

(15) Concurrent jurisdiction

Section 2477 provides: "Where personal property of the decedent is within, or comes into, two or more counties, under the circumstances specified in subdivision third of the last section; or real property of the decedent is situated in two or more counties, under the circumstances specified in subdivision fourth of the last section; the surrogate's courts of those counties have concurrent jurisdiction, exclusive of every other surrogate's court, to take the proof of the will and grant letters testamentary thereupon, or to grant letters of administration, as the case requires. But where a petition for probate of a will, or for letters of administration, has been duly filed in either of the courts so possessing concurrent jurisdiction, the jurisdiction of that court excludes that of the other."

In Matter of Hathaway, 27 Misc. 474, Surrogate Varnum vacated order appointing appraiser in New York County, it appearing that the surrogate of Chemung County had issued ancillary letters. Matter of Arnold, 114 App. Div. 244.

(16) Petition for appointment of appraiser

The application for the appointment of an appraiser is made *ex parte* under the provisions of the second sentence of § 230.

SURROGATES' COURT, COUNTY OF NEW YORK.

In the Matter of the Transfer
Tax on the Estate of
SARAH AMELIA HEWITT,
Deceased.

*Petition for Appointment of
Appraiser.*

To the Surrogates' Court of the County of New York:

The petition of PETER COOPER HEWITT, ERSKINE HEWITT and JAMES O. GREEN, respectfully shows as follows:

First: Sarah Amelia Hewitt, the above named decedent, died on the 14th day of August, 1912. At the time of her death she

was, and for many years before then she had been, a resident of Ringwood, Passaic County, New Jersey, where she died.

Second: She left a last Will and Testament which, on the 10th day of October, 1912, was duly admitted to probate by the Surrogate of Passaic County, New Jersey, to whom jurisdiction in that behalf did properly belong, and on the same day, October 10th, 1912, letters testamentary were issued by the said Surrogate to your petitioners, as executors of the said last Will and Testament; and thereupon your petitioners entered upon the discharge of their duties, and are still acting, as such executors.

Third: As your petitioners are informed and believe, some portion of the property of which the said decedent was seized and possessed at the time of her death is or may be subject to the payment of the tax imposed by the laws of the State of New York in relation to taxable transfers of property.

Fourth: All of the persons who are interested in the estate of the said Sarah Amelia Hewitt, deceased, and entitled to notice of proceedings herein, together with their respective places of residence and post office addresses, are as follows:

Your petitioner Peter Cooper Hewitt, who is a son of the said decedent and an executor of and trustee under her said last Will and Testament and who resides at, and whose post office address is, Ringwood Manor, Passaic County, New Jersey.

Your petitioner Erskine Hewitt, who is a son of the said decedent and an executor of and trustee under her said last Will and Testament and who resides at, and whose post office address is, Ringwood Manor, Passaic County, New Jersey.

Your petitioner, James O. Green, who is a son-in-law of the said decedent and an executor of and trustee under her said last Will and Testament and who resides at, and whose post office address is, Ringwood Manor, Passaic County, New Jersey.

Edward R. Hewitt, who is a son of the said decedent and who resides at, and whose post office address is, Ringwood Manor, Passaic County, New Jersey.

Amy H. Green, who is a daughter of the said decedent and who resides at, and whose post office address is, Ringwood Manor, Passaic County, New Jersey.

Sarah Cooper Hewitt, who is a daughter of the said decedent and who resides at, and whose post office address is, Ringwood Manor, Passaic County, New Jersey.

Eleanor G. Hewitt, who is a daughter of the said decedent and

who resides at, and whose post office address is, Ringwood Manor, Passaic County, New Jersey.

The following, who are children of the said Edward R. Hewitt and reside with him, and whose post office addresses are in his care, at Ringwood Manor, Passaic County, New Jersey, namely, his sons, Ashley Cooper Hewitt and Abram Stephens Hewitt, and his daughters, Candace Hewitt and Lucy Hewitt.

Hon. William Sohmer, Comptroller of the State of New York, whose office for the transaction of business and whose post office address are at Albany, New York.

WHEREFORE your petitioners pray for an order appointing some competent person as an appraiser of such portion, if any, of the property belonging to the estate of the said Sarah Amelia Hewitt, as is subject to the tax above referred to, and of the several estates and interests, if any, in the said property which are subject to the said tax, and directing the said appraiser to give such notice of the appraisement to those entitled thereto as may be proper, and for such other and further relief as may be just.

Dated, New York, November 1, 1912.

PETER COOPER HEWITT,
ERSKINE HEWITT,
J. O. GREEN.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

Peter Cooper Hewitt, Erskine Hewitt and James O. Green, being duly and severally sworn, each for himself, says: I am one of the petitioners herein. I have read the foregoing petition. The same is true of my own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

PETER COOPER HEWITT,
ERSKINE HEWITT,
J. O. GREEN.

Sworn to before me this

1st day of November, 1912.

LAURA E. SMITH,

Notary Public, Kings County.

Certificate filed in New York County No. 54,
Reg. No. 3224.

(17) Order appointing appraiser

The order entered upon the application is as follows:

At a Surrogates' Court, held in and
for the County of New York, at
the Hall of Records in the Bor-
ough of Manhattan, in The City
of New York, on the 4th day
of November, 1912.

Present: HON. ROBERT LUDLOW FOWLER, *Surrogate*.

In the Matter of the Transfer
Tax on the Estate of
SARAH AMELIA HEWITT,
Deceased.

Order Appointing Appraiser.

Upon reading and filing the petition of Peter Cooper Hewitt, Erskine Hewitt and James O. Green, verified the 1st day of November, 1912, I do hereby, pursuant to the requirements of Chapter 658 of the Laws of 1900, and the Laws amendatory thereof and supplemental thereto, direct Joseph I. Berry, Esq., one of the appraisers appointed by the State Comptroller under the said statute, to fix the fair market value at the time of the transfer thereof of the property which was of the above named decedent, or was or is of her estate, and which is subject to the payment of any tax imposed by Article 10, Chapter 908 of the Laws of 1896 and the acts amendatory thereof and supplemental thereto.

ROBERT LUDLOW FOWLER,
Surrogate.

(18) Affidavit for appraisal

There has not been adopted any set form of affidavit for appraisal of non-resident estates.

Prior to the 1911 amendment it was necessary to comply with rather sweeping requirements, but the appraisal has now been much simplified. The practice after the order has been obtained follows that outlined in resident estates, except, of course, as to the form of the affidavit for appraisal and the scope of the enquiry regarding the property of the decedent. Vide Procedure *supra*, page 82.

In the preparation of the affidavit for appraisal the following form will be an aid:

SURROGATES' COURT, COUNTY OF NEW YORK.

In the Matter of the Appraisal,
under the Transfer Tax Law,
of the Estate of

JOHN DOE,
Deceased.

Affidavit for Appraisal.

STATE OF NEW JERSEY, }
COUNTY OF MONMOUTH, } ss.:

Henry Smith being duly sworn says:

First: That deponent resides at Locust, Monmouth County, State of New Jersey.

That John Doe, the decedent, died on the first day of September nineteen hundred and thirteen at Locust, Monmouth County, State of New Jersey.

That at the time of his death the decedent was a non-resident of the State of New York. That decedent at the time of his death and for many years prior thereto had been a resident of said Locust (19).

Second: Decedent left a last will and testament, a certified copy of which is herewith submitted, which was duly admitted to probate by the Surrogate of Monmouth County, State of New Jersey, on the eighteenth day of September nineteen hundred and thirteen, to whom jurisdiction in that behalf did properly belong, and letters testamentary were duly issued to deponent on the nineteenth day of September nineteen hundred and thirteen, as executor of said last will and testament; and thereupon deponent duly qualified and is still acting as such executor.

If letters have not been issued then so state. Vide *supra*, page 137.

Third: That *Schedule A* hereunto annexed in its sub-schedules sets forth fully and in detail all the real estate in the State of New York, and all tangible personal property within the State of New York, owned by the decedent or in which said decedent had any right, title or interest at the time of his death, or of which he made any gift, grant or conveyance in contemplation of death, or to take effect at or after death, or which by reason thereof fell into or became part of the assets of this estate by

reversion, remainder or otherwise, excepting such as may have passed by virtue of the exercise by the decedent of any power of appointment vested in him by the Will or Deed or other instrument of another, and enumerated in *Schedule C*.

Schedule A1 sets forth each and every parcel of real estate in the State of New York of which decedent died seized and possessed, or in which he had any right, title or interest, together with a statement of the liens and encumbrances upon each at the date of death, giving in the case of mortgages, the date, place, liber and page of record thereof. It also sets forth in the first marginal column the assessed valuation of each of said parcels and in the second marginal column the estimated market value thereof (as appraised by a competent expert in real estate values, whose supplemental affidavit is herewith submitted) (21).

Schedule A2 sets forth all jewelry, silverware, pictures, books, works of art, household furniture, horses, carriages, automobiles, boats, and any and all other personal chattels of whatsoever kind or nature, within the State of New York at the time of the death of the decedent, (20) together with the fairly estimated market value thereof (as appraised by a competent expert, whose supplemental affidavit is herewith submitted) (21).

Schedule A3 sets forth in itemized form, together with the fair market value thereof, any other tangible property of the decedent, within the State of New York at the time of the death of decedent and not included in the preceding sub-schedules. That decedent had no safe deposit box within the State of New York except

Fourth: Schedule B sets forth the valid debts due and owing by decedent at the time of his death to New York creditors (22).

Fifth: Schedule C sets forth such expenses as there may be relative to the administration of the tangible property within the State of New York.

It also sets forth all sums by way of commissions properly and legally chargeable against such property (23).

Sixth: That *Schedule C* hereunto annexed sets forth all the property, real and personal, the transfer of which is subject to tax under the provisions of subdivision 6 of § 220, which passed at decedent's death by virtue of the exercise by him of any power of appointment vested in him by the will, deed or other instrument of another, together with the fair market value of each and every item thereof and a statement in brief of the

source and derivation of such power, copies of which will, deed or other instrument are submitted herewith.

Vide discussion sub Power of Appointment, *post*, page 781.

Seventh: That *Schedule D* hereunto annexed contains a statement of the names of all persons beneficially interested in this estate at the time of decedent's death, the nature of their respective interests, their relationship, if any, to the decedent, together with the ages at the time of decedent's death of all minors, annuitants and beneficiaries for life under decedent's will, if any. It also contains a statement, showing which of the beneficiaries named in decedent's will, if any, died prior to decedent, the dates of their deaths, their survivors, and the relationship of such survivor to decedent.

Eighth: That deponent has made due and diligent search for tangible property within the State of New York left by the decedent, and has been able to discover only that set forth in *Schedule A*, and that no information of any other such property of the decedent has come to his knowledge, and that he verily believes that decedent left no such property except as therein set forth.

That all the sums claimed as deductions in *Schedule B* are lawful, just and fair.

That to the best of deponent's knowledge, information and belief the decedent made no gift, grant or conveyance of any tangible property, real or personal, in contemplation of death, or to take effect at or after death, except as may be so specifically set forth in the appropriate sub-schedule of *Schedule A*.

Deponent further says that wherever in any of said sub-schedules the word "none" has been written in or wherever such sub-schedule has been left blank, such word or omission is to be taken as equivalent to an affirmative allegation by deponent that the decedent left no property of the kind to which such sub-schedule relates.

HENRY SMITH.

Sworn to before me this

1st day of October, 1913.

JOHN JONES,

Notary Public,

Monmouth County.

Attach county clerk's certificate.

(19) Question of residence

The question of residence is given close scrutiny. It is sometimes necessary to take testimony. Vide *MATTER OF GRANT*, N. Y. Law Journal, November 14, 1913, opinion quoted *post*, page 833.

The proof required to establish residence varies with the circumstances of each case. The following affidavit is a good example of the method of placing in the record convincing allegations as to residence of decedent.

SURROGATES' COURT, NEW YORK COUNTY.

In the Matter of the Transfer
Tax upon the Estate of
THOMAS F. BARDON,
Deceased.

COUNTY OF NEW YORK, ss.:

LAWRENCE BARDON, being duly sworn, says that he is the executor under the last Will and Testament of the above named deceased.

That said Thomas F. Bardon at the time of his death was a resident of Locust, Monmouth County, New Jersey. That said Thomas F. Bardon from November 13, 1902, had a life estate in the dwelling at Locust aforesaid, which was formerly the property of Mary E. Bardon the wife of said Thomas F. Bardon.

Upon the death of said Mary E. Bardon, deponent and Mary L. Bardon, the son and daughter respectively, of said Mary E. Bardon, deceased, recognized the life estate of said Thomas F. Bardon in the property of said Mary E. Bardon and consented to the use and occupation of said premises at Locust aforesaid, by said Thomas F. Bardon as his home and residence.

That for a period of more than six years said Thomas F. Bardon paid personal taxes as a resident of the Township of Middletown within which is comprised Locust, aforesaid, as more fully appears by the receipts of the tax collector of said Township, hereto attached and made part hereof.

That said Thomas F. Bardon also voted at the place of his residence as appears from the certificates of the Clerk of the Board of Election, hereto attached and made part hereof.

That whenever said Thomas F. Bardon sojourned in New York City he remained at the apartment of his daughter Mary

L. Bardon at No. 97 Central Park West. That said apartment was leased by said Mary L. Bardon in her own name and maintained by her as her personal residence.

LAWRENCE BARDON.

Sworn to before me this

17th day of February, 1913.

AUGUST BAUTZ, Jr.,

Commissioner of Deeds,

City of New York.

(20) Property transiently within state

Property casually brought into the state for a temporary purpose is not subject to the tax. *Matter of Romaine*, 127 N. Y. 80-88; *Matter of Enston*, 113 N. Y. 174-182; *Matter of Leopold*, 35 Misc. 369.

INVOLUNTARY DETENTION in this state by act of controller does not operate to make property so detained subject to tax. *Matter of Revere*, N. Y. Law Journal, January 28, 1913.

(21) Appraisals by experts

The practice is the same as in resident estates. *Vide Matter of Barnes*, N. Y. Law Journal, Dec. 17, 1913, *post*, page 694.

(22) Debts due resident creditors

Debts due resident creditors were deducted from the New York assets prior to the 1911 amendment. *Matter of King*, 71 App. Div. 581, affirmed, on opinion below, 172 N. Y. 616; *Matter of Grosvenor*, 124 App. Div. 331, and 126 App. Div. 953, affirmed 193 N. Y. 652.

The rule in the *King* and *Grosvenor* cases, *supra*, applies to the present statute.

(23) Foreign debts and administration expenses

In *Matter of Porter*, a non-resident estate in which the decedent died prior to the 1911 amendment, 67 Misc. 19, affirmed, without opinion, 148 App. Div. 896, Surrogate Thomas said:

"The executor also appeals from the refusal of the appraiser to allow any deduction on account of debts presumably owing to creditors without the State, funeral ex-

penses and administration expenses, including commissions in respect to property without the State. It is now insisted on behalf of the State Comptroller that as debts owing by a non-resident decedent to New York creditors must be deducted *in toto* from New York assets, under the decision in *Matter of Grosvenor*, 124 App. Div. 331, *affd.*, 193 N. Y. 652, no further deductions are allowable except for New York administration expenses and New York commissions. No decision refusing *in toto* the deductions in question has yet been made. On the contrary, it has been held that such deductions are to be made upon a *pro rata* basis. In the *Estate of Alice Key Browne*, my memorandum, published in the *New York Law Journal* of May 25, 1907, reads as follows:

“‘*Estate of Alice Key Browne*—The appeal was taken in time. The appraiser acted correctly in pro rating debts due to creditors not domiciled in this State and funeral expenses (*Matter of Doane*, N. Y. Law Journal, March 12, 1903). He was also correct in pro rating the annuities or gifts of income which are directed by the will to be paid generally out of the income of the residuary estate given by the will to the executor in trust. The executor, however, is entitled to have all expenses of administration, including the commissions allowable to him in the domiciliary jurisdiction, also pro rated, and for this purpose the matter will be remitted to the appraiser if counsel are unable to agree upon the amount. Settle order on notice.’

“‘The executor appealed from each and every part of the order made pursuant to this memorandum, except the part which adjudged the appeal to have been taken in time. In the Appellate Division the order was affirmed without opinion (*Matter of Browne*, 127 App. Div. 941), and in the Court of Appeals (195 N. Y. 522) the appeal was dismissed with the following memorandum:

“‘*Per curiam*—While we would have no difficulty in disposing of this appeal by affirming the order on the merits if the appeal was properly before us, we are of the opinion that the order appealed from is interlocutory, and therefore the appeal must be dismissed, with costs.’

"The exact basis upon which the *pro rata* allowances should be made was, however, not litigated or determined in that case. In view of the fact that the rule established in the Grosvenor case, *supra*, for the deduction of New York debts is very liberal to the estates of non-resident decedents. I think the deduction to be made for debts owing to non-resident creditors, mortuary expenses, commissions on property without the State and other administration expenses in respect to such property, should be in the proportion which the net New York estate (after all deductions are made for debts owing to resident creditors, New York commissions and New York administration expenses) bears to the entire or gross estate, wherever situated. The trustee's commissions, which are the subject of the fourth ground of appeal, will be allowed *pro rata* to the extent here indicated."

The reasoning of the Porter case would seem to apply to transfers occurring since the 1911 amendment.

COMMISSIONS OF FOREIGN EXECUTORS will be allowed if claimed and evidence introduced before the appraiser showing what the amount of such commissions will be. Such commissions will be prorated.

(24) *Pro rata* deductions

In order to entitle non-resident estate to the *pro rata* deductions for foreign debts, mortuary expenses and general administration expenses it is apparent that there should be presented to the appraiser itemized schedules of all the assets of the estate wheresoever situated, as well as an itemized list of all such debts and expenses.

(25) Cannot compel disclosure of non-taxable assets

Many non-resident estates object to giving this information, and they are within their rights in refusing. In *Matter of Bishop*, 82 App. Div. 112-115, the Court said: "There is no reason why the executor of the will should be put to the annoyance and expense of preparing inventories and exhibiting the condition of an estate as to items not taxable in the State of New York."

If the representative of the estate stands on his rights

and does not furnish the information as to non-taxable assets there will not be before the appraiser data upon which can be based the *pro rata* deductions. As was said by Surrogate Thomas in Matter of Whiting, 69 Misc. 526-527, affirmed, 200 N. Y. 520: "It is only incidental to this purpose, and in order to apportion between the property in this state and the property elsewhere the debts and expenses of administration, that an inquiry is made into the value of the property located outside of this state."

The form set forth *supra* does not provide for the listing of non-taxable assets. If it is desired to set forth such assets then there should be added to the affidavit a schedule giving the itemized list of the assets wheresoever situated, and also a schedule itemizing the debts and expenses.

(26) New York taxable portion determines tax

The taxable amount of the New York portion of the estate passing to each beneficiary determines whether the transfer is subject to the tax. Formerly it was the aggregate taxable amount of the New York portion of the estate which determined, but this was changed by the amendment of Laws 1910, Chap. 706, in effect July 11, 1910; Matter of Ramsdill, 190 N. Y. 492-494.

To illustrate: the total net value of the property wheresoever situated of a non-resident decedent is one million dollars. Of this net estate, eight hundred thousand dollars is personal property situated without the state and is not taxable for that reason; one hundred thousand dollars is in stock of New York corporations and deposits in New York banks which are not taxable since the amendment of §§ 220 and 243 by Laws 1911, Chap. 732, in effect July 21, 1911.

The remaining one hundred thousand dollars is corporeal property such as goods, wares and merchandise, within the state, and therefore subject to the tax. Subdivision 2 of § 220 and the second sentence of § 243. What the tax would be on this property of the value of one

hundred thousand dollars depends upon the beneficiaries who are to receive it. Section 221a.

Assume that no part of the estate is specifically bequeathed and that it is to be divided as follows: one hundred thousand dollars to a daughter, ninety thousand dollars to a brother, sixty thousand dollars to a mother, sixty thousand dollars to a niece, twenty thousand dollars to a nephew, sixty thousand dollars to a charitable corporation and ten thousand dollars to a person not related to the testator, and the residue, six hundred thousand dollars, two-thirds to the widow and one-third to the son of testator.

As the value of the non-taxable property is nine hundred thousand dollars and the property within the state subject to the tax is one hundred thousand dollars, the proportion of the estate subject to the tax is one-tenth, and to arrive at the New York taxable portion of each legacy the share of each beneficiary should be divided by ten in accordance with the provisions of subdivision 3 of § 220. Applying the principle to this hypothetical case the tax would work out as follows:

<i>Beneficiary</i>	<i>Entire interest</i>	<i>New York portion subject to the tax</i>	<i>Amount of interest exempt</i>	<i>Rate</i>	<i>Tax</i>
Widow.	\$400,000	\$40,000	\$5,000	1%	\$350
Son.	200,000	20,000	5,000	1%	150
Daughter.	100,000	10,000	5,000	1%	50
Brother.	90,000	9,000	5,000	1%	40
Mother.	60,000	6,000	5,000	1%	10
Niece.	60,000	6,000	1,000	5%	250
Nephew.	20,000	2,000	1,000	5%	50
Not related.	10,000	1,000	1,000	—	0
Charitable cor- poration.	60,000	6,000	6,000	—	0
	<hr/> \$1,000,000	<hr/> \$100,000			<hr/> \$900

(27) Graded rates of tax

If the taxable New York portion of an estate passing to a beneficiary enumerated in subdivision 1 of § 221a is over

fifty-five thousand dollars, or fifty-one thousand dollars in case of a beneficiary not enumerated in said subdivision 1, then the principle of graded taxes begins to work. For discussion of rates of tax and exemptions vide *supra*, page 43.

(28) Cannot marshal assets to avoid tax

The question of marshaling assets of a non-resident decedent is discussed in a recent opinion handed down by the State Comptroller and reported 1 State Department Reports, 605. The opinion refers to subdivision 3 of § 220 and says: "This provision reads as follows: 'Whenever the property of a resident decedent, or the property of a non-resident decedent within this state, transferred by will is not specifically bequeathed or devised, such property shall, for the purposes of this article, be deemed to be transferred proportionately to and divided *pro rata* among all the general legatees and devisees named in said decedent's will, including all transfers under a residuary clause of such will,' and first became a part of § 220 of the Tax Law by Chap. 310 of the Laws of 1908, in effect May 18 of that year.

"In an early case (Matter of James, 144 N. Y. 6) the Court of Appeals held, in transfer tax proceedings on the property in this state, of a non-resident decedent, that a foreign executor had the right and could elect to pay legacies passing to collateral relatives from property of the decedent *at his domicile*, so that the entire assets here would pass to lineals or other near relatives and, under the earlier law, thus escape taxation.

"After the Law of 1891, taxing transfers to lineals and other near relatives, the practice for a number of years was to tax the transfers of the property of a non-resident decedent within this state proportionately as passing *pro rata* to both the one and the five per cent class, in all cases where the decedent left legatees or heirs at law and next of kin in both classes of taxable persons.

"About the year 1904 the non-resident executors commenced to incorporate in their affidavits a provision

to the effect that under the James decision, above referred to, they elected to apply all the assets in this state to the payment of legacies to those in the one per cent class and had paid or intended to pay the five per cent legacies from property of the decedent without this state. In the Matter of McEwan, 51 Misc. Rep. 455, the court held that where the non-resident executor had failed to file an election showing the fund from which the legacies to collateral relatives would be paid, that there was no warrant of law to justify the appraiser in assuming that the taxable legacies under the will would be paid *pro rata* out of property in this state, as the natural inference was that the assets would be marshalled by the foreign executor in such a way as to require the smallest payment of tax, and if the affidavit of the executor was material to produce a different result, the burden of proving the fact rested upon the state.

“In Matter of Ramsdill, 119 App. Div. 890, both the surrogate and the Appellate Division held that where a non-resident decedent died intestate the administrator of the foreign estate had the same right to elect to apply the assets within this state in payment of the exempt legacies or legacies taxable at the lowest rate that an executor had, but the Court of Appeals reversed the Appellate Division in this case (Matter of Ramsdill, 190 N. Y. 492), holding: ‘Where a non-resident of this state dies intestate leaving assets both in the place of his domicile and in this state and his next of kin consists of a brother and certain nephews and nieces, his administrator cannot, by electing to apply all of the portion of the estate within our jurisdiction to the payment of the brother’s distributive share, avoid the payment of a transfer tax upon that part thereof to which the nephews and nieces would have been entitled. If a specific legatee of a foreign testator can obtain satisfaction of his legacy in a foreign jurisdiction the executor cannot be compelled to pay it out of the assets within our jurisdiction, but in a case of intestacy, where the distributee takes an undivided interest in the whole estate and he can only get his share of the assets within this

state, under our laws and through our courts, the administrator cannot so apply that portion of the estate as to avoid the payment of a tax upon a transfer that is taxable under the statute.'

"After this decision subdivison 2a (now subd. 3) of § 220 of the Tax Law was added by Chap. 310 of the Laws of 1908, and was intended to make the practice uniform in respect to taxing the transfers of property *in both testate and intestate estates of non-resident decedents*, thereby taking away from the non-resident executor the right to elect to apply the assets in this state in payment of exempt legacies, or legacies taxable at the lowest rate, unless, of course, the property here was specifically bequeathed or devised.

"I assume the intent and meaning of this provision is somewhat obscure to one not acquainted with the foregoing facts, because the provision applies to the transfer of the property of a resident as well as the property in this state of a non-resident decedent. The property of a resident decedent was included in this provision doubtless to meet any constitutional objection to the amendment, which otherwise might have been raised."

(29) Specifically bequeathed or devised property

If the non-resident decedent specifically devises New York real estate or makes a specific bequest of tangible personal property within the state then such specific devise or bequest is taxable against the individual devisee or legatee.

Specific bequests or devises, whether of taxable or non-taxable property, should be deducted from the assets of the estate before the computation of the *pro rata* amount of the taxable property passing to the other beneficiaries.

(30) Report where property specifically devised

Where there are specific devises of New York real property the report of the appraiser follows this form:

SURROGATES' COURT, COUNTY OF NEW YORK.

In the Matter of the Appraisal,
under the Transfer Tax Law,
of the Estate of
SARAH AMELIA HEWITT,
Deceased.

Report of Appraiser.

To the Surrogates' Court of the County of New York:

I, Joseph I. Berry, who was by an order of Hon. Robert Ludlow Fowler, one of the Surrogates of the County of New York, made and entered on the 6th day of November, 1912, certified copy of which order is hereunto annexed, directed to act as Appraiser, pursuant to Chapter 908 of the Laws of 1896, and the Acts amendatory thereof and supplemental thereto, do respectfully report:

First: Having filed my oath of office, pursuant to Chapter 173 of the Laws of 1901, in the office of the State Comptroller, I gave notice by mail, postage prepaid, to all persons known to have or claiming an interest in property of said deceased, to wit, to the persons and corporations, named in the petition presented on the application for said order. The time and place were duly set forth in said notice at which I would appraise such property of the above-named decedent as might be subject to the payment of the transfer tax; a true copy of said notice is hereto attached:

Second: I further report that, at the time and place in said notice stated, to wit: On the 10th day of February, 1913, at Room 2900, City Investing Building, No. 165 Broadway, in the Borough of Manhattan, City, County and State of New York, I appraised the estate of Sarah Amelia Hewitt, deceased, situate within the State of New York, at its fair market value on the 14th day of August, 1912, the date of her death, as follows;

Real Estate in New York

Premises, No. 9 Lexington Ave.	\$148,000.00
Premises, No. 13 Lexington Ave.	46,000.00
Premises, No. 145 East 22d Street.	38,000.00
Burris Farm, Orange County, N. Y.	3,500.00
Total real estate in New York	\$235,500.00

Tangible Property in New York

Furniture, etc.	\$ 10,492.50
Contents of stable.	250.00

Gross estate in New York\$246,242.50
(No deductions)

Third: I further report that Sarah Amelia Hewitt died on the 14th day of August, 1912, a resident of the State of New Jersey, leaving a last will and testament, a copy of which is hereto annexed, and that thereafter on the 10th day of October, 1912, said will was admitted to probate by the Surrogate of Passaic County, New Jersey, and Peter Cooper Hewitt and Erskine Hewitt were duly appointed executors.

By the terms of said will, this estate is disposed of as per the 6th paragraph of this report.

Fourth: I further report that all persons interested in this estate are of full age and sound mind.

Fifth: I further report the following appearances before me in this proceeding.

JOHN S. JENKINS, Esq.,

Attorney for State Comptroller.

PARSONS, CLOSSON & McILVAINE, Esqs.,

Attorneys for Executors.

Sixth: I further report that I appraised the estate of Sarah Amelia Hewitt, deceased, situate within the State of New York, subject to tax in this proceeding, at its fair market value on the 14th day of August, 1912, the date of her death, as follows:

<i>Beneficiaries</i>		<i>Exempt</i>	<i>Taxable</i>
Amy H. Green, daughter:			
Realty specif. devised	\$46,000.00		
1/6 residue.	6,333.34		
	<hr/>		
	\$52,333.34	\$5,000	\$47,333.34
Sarah C. Hewitt, daughter:			
Realty specif. devised	\$74,000.00		
1/2 furniture.	5,371.25		
1/2 Burris Farm.	1,750.00		
1/6 residue	6,333.33		
	<hr/>		
	\$87,454.58	\$5,000	82,454.58

Eleanor G. Hewitt, daughter:	Same,	5,000	82,454.58
Erskine Hewitt, son:			
$\frac{1}{6}$ residue.....	\$6,333.33	5,000	1,333.33
Peter C. Hewitt, son:	Same,	5,000	1,333.33
Edward R. Hewitt, son:			
Life estate in $\frac{1}{6}$ residue	\$6,333.33		
Less commissions	133.33		
Net life estate in.....	\$6,200.00		
Present value	\$3,898.00	3,898	
Remainder \$2,192 to:			
Ashley C. Hewitt, grandson: $\frac{1}{4}$	\$548.00	548	
Abram S. Hewitt, grandson:	Same,	548	
Candace Hewitt, granddaughter:	Same,	548	
Lucy Hewitt, granddaughter:	Same,	548	
	Respectfully submitted,		
Dated New York,	JOSEPH I. BERRY		
July 10, 1913.	Appraiser.		

(31) Order entered thereon

At a Surrogates' Court, held in and for the County of New York, at the Hall of Records, in the Borough of Manhattan, The City of New York, N. Y., on the 22d day of July, 1913.

Present: HON. JOHN P. COHALAN, *Surrogate*.

In the Matter of the Appraisal
under the Act in Relation to
Taxable Transfers of Prop-
erty of the Property of
 SARAH AMELIA HEWITT,
 Deceased.

*Order Fixing Tax under
§ 231.*

Upon reading the report of Joseph I. Berry, Esq., the Appraiser herein, duly filed in the office of the Surrogates of the County of New York, on the 11th day of July, 1913, wherein it appears that the above-named decedent died on the 14th day of August, 1912, a resident of the State of New Jersey, leaving certain property situated within the State of New York, it is,

after hearing Parsons, Closson & McIlvaine, attorneys for the Executors of the Last Will and Testament of the said decedent,

ORDERED AND ADJUDGED that the cash value of the property referred to in the said report on the 14th day of August, 1912, the transfer of which is subject to the tax imposed by the Act Relating to Taxable Transfers and the Acts Supplemental thereto and amendatory thereof, and the taxes to which the said transfers are liable are as follows:

<i>Beneficiaries</i>	<i>Cash value of interest</i>	<i>Exempt</i>	<i>Taxable interest</i>	<i>Tax assessed thereon</i>
Amy H. Green, daughter	\$52,333.34	\$5,000	\$47,333.34	\$ 473.33
Sarah C. Hewitt, daughter	87,454.58	5,000	82,454.58	1,149.09
Eleanor G. Hewitt, daughter	87,454.58	5,000	82,454.58	1,149.09
Erskine Hewitt, son	6,333.33	5,000	1,333.33	13.33
Peter Cooper Hewitt, son	6,333.33	5,000	1,333.33	13.33

JOHN P. COHALAN,

Surrogate.

The third paragraph of § 231, *supra*, page 19, provides that the surrogate shall forward a copy of the taxing order to the state comptroller, and from this provision has arisen the practice of requiring the attorney for the estate to submit two copies of the proposed order.

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The statute is the result of twenty-eight years of legislative amendment, many of the changes having been made as a direct result of the decisions of the courts. The Court of Appeals have passed upon the various sections of the statute over one hundred and sixty times,

and the United States Supreme Court have had the statute before it in several cases.

These cases have been arranged in chronological order of their decision for the convenience of the practitioner who desires to study the law as it has been developed by the courts of last resort. These are also treated topically, *post*, page 582.

The extracts from the decisions have been selected with the view of covering the questions which would be most likely to arise in present day practice, and the footnotes are intended to aid in applying the opinion to the other adjudications on similar subjects.

In addition to these cases the reports abound in the decisions of the Surrogates' Courts and of the old General Terms and of the present Appellate Divisions which have not been taken to the Court of Appeals. The ones which are important have been cited topically, *post*, page 582.

1887.

MATTER OF MARY McPHERSON, 104 N. Y. 306.

The constitutionality of the Act of 1885, chapter 483, in effect June 30, 1885, was upheld, the court saying, page 316: "Taxes upon legacies and inheritances have been approved generally by writers upon political economy and systems of taxation, and no tax can be less burdensome and interfere less with the productive and industrial agencies of society. Such taxes were imposed in Rome two thousand years ago, and are now imposed in England and several of the continental countries of Europe, and in the States of Pennsylvania, Maryland and Virginia, and perhaps other States of this country (Williams' Case, 3 Bland's Ch. R. 186, 259; *Eyre v. Jacobs*, 14 Gratt. 422), and in 1864 (13 U. S. Stats. at Large, 287) a tax was imposed by the Federal government upon successions to real estate. The acts imposing such taxes have frequently come before the courts, and have uniformly been upheld. *Carpenter v. Comm. of Penn.*, 17 How. 456; *Scholey v. Rew*, 23 Wall. 331; *Clapp v. Sampson*, 94 U. S. 589; *Wright v. Blakeslee*, 101 id. 174; *Mason v. Sargent*, 104 id. 689; *In re Short's Estate*, 16 Pa. 63; *Stinger v. Comm.*, 26 id. 422; *Comm. v. Freedley*, 21

id. 33; *Strode v. Comm.*, 52 id. 181; *Miller v. Comm.*, 27 Gratt. 110; *Tyson v. State*, 8 Md. 578; *State v. Dorsey*, 6 Gill, 388; *Williams' Case*, Bland's Ch. R. 186. The case of the *State v. Dorsey* was a curious one, possible only under a state of society long since passed in this country. There the bequest of freedom to a slave was held to be a legacy within the meaning and operation of the Maryland act imposing taxes upon legacies, and the executor was compelled to pay it."

There is sufficient provision for notice and hearing for all persons interested in the tax, and the Act secures to every taxpayer, due process of law so far as it is applicable to cases of taxation. If the appraiser should omit to give notice to all persons entitled to notice under the statute, it would be an error on account of which any tax imposed upon the person not notified or heard, would be invalid as having been imposed without jurisdiction.

Vide §§ 230 and 231. *Matter of Vassar*, 127 N. Y. 1-12; *Matter of Romaine*, 127 N. Y. 80-86; *Matter of Embury*, 19 App. Div. 214-217, affirmed, with opinion, 154 N. Y. 746; *Matter of Kimberly*, 27 App. Div. 470; *Matter of Swift*, 137 N. Y. 77-83; *Matter of Ullmann*, 137 N. Y. 403-407; *Weston v. Goodrich*, 86 Hun, 194-199; *Matter of Wolfe*, 89 App. Div. 349-352, affirmed, without opinion, 179 N. Y. 599; as to § 25 of article 3 of Constitution, *Matter of Stickney*, 110 App. Div. 294-296, affirmed, per curiam, 185 N. Y. 107; *Beers v. Glynn*, 211 U. S. 477-483; *Matter of Winters*, 21 Misc. 552-555; *Matter of Daly*, 34 Misc. 148-150.

1888.

MATTER OF MARY E. MILLER, 110 N. Y. 216.

Testatrix died September 30, 1886. The original Act (chapter 483, Laws of 1885) provided, *inter alia*, that all property or the income thereof, which passed by will to any corporations or persons other than "the father, mother, husband, wife, children, brother and sister, and lineal descendants born in lawful wedlock, * * * shall be subject to a tax, to be paid to the treasurer of the proper county, * * * for the use of the state and that all administrators, executors and trustees shall be liable for such tax until the same shall have been paid as in the act directed." Testatrix died September 30, 1886, bequeathing a portion of her property to one who, in his infancy, had been adopted by the testatrix as her son.

Held, that a transfer to an adopted child was taxable, and

that the amendment of chapter 713 of the Laws of 1887 was not retroactive. The fact that said 1887 amendment added to the original statute the words "or any child or children adopted as such, in conformity with the Laws of the State of New York" must be regarded as a legislative declaration that the law did not, as originally passed, embrace the provisions which the latter act supplies.

Vide subdivision 1, § 221a. *Matter of Butler*, 58 Hun, 400, affirmed, without opinion, 136 N. Y. 649; *Matter of Cook*, 187 N. Y. 253-261; *Matter of Duryea*, 128 App. Div. 205-207; Domestic Relations Law, § 114. As to burden of proof vide *Matter of Fisch*, 34 Misc. 146; *Matter of Enston*, 113 N. Y. 174-183; *Matter of Harbeck*, 161 N. Y. 211-217; *Matter of Buckingham*, 106 App. Div. 13-19.

1888.

MATTER OF WILLIAM CAGER, 111 N. Y. 343.

The testator died in May, 1886, and in the inheritance tax proceedings it became necessary to construe his will. The court held that the widow took a life estate in the property devised with a limited power of disposition for her use and enjoyment, and that any interest in the other legatees was dependent upon the contingency whether the power of disposition was exercised by the life tenant during her life. While it was possible that the legatees might eventually take a valuable estate, that event, being contingent upon the non-exercise by the widow of the power of disposition, rendered the present appraisable value of such interest incapable of any correct or reasonably approximate valuation.

The court say, page 350: "Whether an appraisal of the value of these devises, for the purpose of taxation, may be made when they eventually come to the possession of the devisees, we are not called upon now to determine. It may be that the tax will be altogether lost to the State if an appraisal is not now allowed; but if so, the fault lies in the act itself and not in the construction which its language requires to be put upon it." ¹

The act authorized the imposition of taxes upon transfers to collateral relatives and strangers only when the estate devised to them individually exceeded the sum of \$500.

Vide *Matter of Babcock*, 37 Misc. 445-448, affirmed, without opinion, 81 App. Div. 645; *Matter of Elizabeth L. Howe*, 176 N. Y. 570; *Matter of*

Burgess, 204 N. Y. 265, and §§ 222 and 230; Matter of Westurn, 152 N. Y. 93-100.

Matter of Ullmann, 137 N. Y. 403-408.

¹ Vide § 221a; Matter of Hoffman, 143 N. Y. 327-330; Matter of Corbett, 171 N. Y. 516; Matter of Costello, 189 N. Y. 288; Matter of Jourdan, 206 N. Y. 653; Matter of Schwarz, 209 N. Y. 000; 1 State Department Reports, 559.

For rates of tax and exemptions under present statute vide page 40.

1889.

MATTER OF MARY HOWE, 112 N. Y. 100.

Testatrix died June 16, 1885. The act was passed June 10, 1885, but did not take effect until the twentieth day after its passage, and as the property in question passed by the will before that day, no tax was payable upon its transfer.

Matter of Hoffman, 143 N. Y. 327-330.

1889.

CATLIN v. TRUSTEES OF TRINITY COLLEGE, 113 N. Y. 133.

Stephen M. Buckingham died a resident December 1, 1887, leaving a will by which he gave a legacy of \$50,000 to Trinity College, a Connecticut corporation, and a legacy of \$10,000 to the St. Paul's Protestant Episcopal Church of Poughkeepsie, incorporated under the Laws of New York. The trustees of Trinity College and the Rector, etc., of St. Paul's Protestant Episcopal Church, appealed from so much of a judgment of the General Term as directed judgment on the case submitted, adjudging that both of said corporations were liable to taxation under the Collateral Inheritance Tax Act (chapter 713, Laws of 1887), upon the two said legacies. The Court of Appeals say, page 142: "We know of no general statute exempting the personal property of religious societies or colleges from taxation and we are of opinion that neither St. Paul's Church nor Trinity College was 'exempted by law from taxation' within the Collateral Inheritance Act of 1887."

Vide § 221; Matter of Van Kleeck, 121 N. Y. 701-703; Matter of Vassar, 127 N. Y. 1-12; Matter of Prime, 136 N. Y. 347-356; Matter of Wolfe, 137 N. Y. 205-210; Matter of Huntington, 168 N. Y. 399-407; United States v. Perkins, 163 U. S. 625-630.

As to submission of controversy, *Isham v. N. Y. Assn. for Poor*, 177 N. Y. 218; Code of Civil Procedure, § 1279.

Vide *Weston v. Goodrich*, 86 Hun, 194-202, as to jurisdiction of Supreme Court.

1889.

MATTER OF HANNA ENSTON, 113 N. Y. 174.

Testatrix died October 26, 1886, a resident of Philadelphia. A large portion of her property consisted of real estate in the County of Kings and bonds secured by mortgages upon real estate in the State of New York. The court upheld the claim of her executors that the transfer of the decedent's property was not subject to the Collateral Inheritance Tax because decedent was a non-resident of the State of New York. The court say, page 177: "The tax imposed by this act is not a common burden upon all the property or upon the People within the State. It is not a general but a special tax, reaching only to special cases and affecting only a special class of persons. The executors in this case do not, therefore, in any proper sense, claim exemption from a general tax or a common burden. Their claim is that there is no law which imposes such a tax upon the property in their hands as executors. If they were seeking to escape from general taxation, or to be exempted from a common burden imposed upon the People of the State generally, then the authorities cited by the learned counsel for the People, to the effect that an exemption thus claimed must be clearly made out, would be applicable. But the executors come into court claiming that the special taxation provided for in the law of 1885 is not applicable to them, or the property which they represent. In such a case, they have the right, both in reason and in justice, to claim that they shall be clearly brought within the terms of the law before they shall be subjected to its burdens.

"It is a well-established rule that a citizen cannot be subjected to special burdens without the clear warrant of the law. The following authorities furnish the true rule applicable to such a case: *Cooley on Taxation* (2d ed. 275); *United States v. Wigglesworth* (2 Story, 373); *Powers v. Barney* (5 Blatch. 203); *United States v. Watts* (1 Bond, 583); *Doe v. Snaith* (8 Bing. 152); *Green v. Holloway* (101 Mass. 248) * * *

"(Page 183.) By chapter 713 of the Laws of 1887, section 1 of the act of 1885 was so amended as to subject to its operation

the property within this State of a non-resident decedent, and this amendment furnishes some evidence that prior thereto the proper construction of the section, according to the understanding of the legislature, did not include within its operation such property."

Vide subdivisions 2 of § 220 and § 243. For discussion of present law vide page 133.

Matter of Vassar, 127 N. Y. 1-12; Matter of Romaine, 127 N. Y. 80-84; Matter of Swift, 137 N. Y. 77-83; Matter of Ullmann, 137 N. Y. 403-407; Matter of James, 144 N. Y. 6-10; Matter of Bronson, 150 N. Y. 1-6; Matter of Embury, 19 App. Div. 214-215, affirmed, without opinion, 154 N. Y. 746.

Matter of Wolfe, 89 App. Div. 349-351, affirmed, without opinion, 179 N. Y. 599; Matter of David Kennedy, 113 App. Div. 4-6; Matter of Leopold, 35 Misc. 369-370; Matter of Stebbins, 52 Misc. 439-441; Matter of Harbeck, 161 N. Y. 211-217; Matter of Miller, 77 App. Div. 473-479; Matter of Bishop, 82 App. Div. 112-116; Matter of Gibbes, 84 App. Div. 510-512, affirmed, without opinion, 176 N. Y. 565; Matter of de Peyster, N. Y. Law Journal, January 21, 1913, affirmed, without opinion, 156 App. Div. 938.

Matter of Mergentime, 129 App. Div. 367-374, affirmed, on opinion below, 195 N. Y. 572; Matter of Starbuck, 63 Misc. 156-159, affirmed in 201 N. Y. 531; Matter of Jourdan, 151 App. Div. 8-12, reversed in 206 N. Y. 653, on dissenting opinion of Jenks, P. J., below; *People ex rel. Lown v. Cook*, 142 N. Y. Supp. 692-696; 158 App. Div. 74-79.

1889.

THE PEOPLE v. MOSES P. PROUT ET AL., AS ADMINISTRATORS, 117 N. Y. 650, affirms, without opinion, 53 Hun, 541.

The court discuss the question of remitting penalty for non-payment of tax under the act of 1885, and say, page 543: "A tax does not carry interest by implication of law as in the case of a debt, and in all systems of taxation where default is made in the payment of the tax interest is added by way of penalty for such default. And so in the fourth section of the act in question, if the tax is paid within one year interest at the rate of six per cent. shall be charged and collected thereon, but if not so paid, interest at the rate of ten per cent. shall be collected and charged from the time such tax accrued, namely, from the death of the decedent. Then follows a premium for prompt payment, as is found in many of the tax laws, whereby

there is allowed in a case where the tax is paid within six months a discount of five per cent. and also a provision that no interest shall be charged. * * * The burden rests upon the party claiming exemption to show that he comes within the provisions of the act, namely, that the settlement of the estate has been delayed by *necessary* litigation or other *unavoidable* cause, and that, therefore, they are not in a condition to settle the estate or pay the tax."

Vide § 223. *People ex rel. Lown v. Cook*, 158 App. Div. 74-79. *Matter of De Graff*, 24 Misc. 147-150; *Matter of Stewart*, 131 N. Y. 274-285; *Matter of Read*, 204 N. Y. 672, quoted *post*, page 384; *Matter of Brower*, N. Y. Law Journal, July 15, 1913, opinion quoted *sub Interest*.

1890.

MATTER OF EDGAR M. VAN KLEECK, 121 N. Y. 701.

Testator died a resident January 6, 1887. He bequeathed to his wife a portion of his estate for life, with remainder of \$10,000 over to Christ Church of Poughkeepsie. The sole question decided was whether said legacy to Christ Church was exempt from inheritance tax under section 1 of chapter 483 of the Laws of 1885, which provided in substance that all property which shall pass by will, other than to or for the use of certain persons named, and the "societies, corporations, and institutions now exempt by law from taxation," shall be subject to a tax of \$5 on every \$100.

Held, that the church was liable unless it could claim exemption under the act as amended by chapter 398 of the Laws of 1890. The court say, page 703: "It is true that the state could by an act of the legislature duly passed release taxes already due. But legislative acts are always construed as prospective in their operation unless by their plain language it can be seen that it was the legislative intention that they should have retroactive effect. This act was clearly prospective in its operation, and applied only to the future, and as this tax became due and payable before its passage, it may still be enforced, in the manner provided in the Collateral Inheritance Act."

Vide § 221. *Matter of Wolfe*, 137 N. Y. 205-210. Vide Exemptions, *post*, page 685.

1891.

**MATTER OF BENJAMIN W. SHERWELL, 125 N. Y.
376.**

Testator, at the time of his death, resided in England. The court say, page 378: "The question we are asked to review is, what construction shall be given to so much of section 1, of chapter 713, of the Laws of 1887, as reads: 'All property which shall pass by will * * * from any person, who may die seized or possessed of the same, * * * to any person or persons * * * shall be and is subject to a tax of five dollars on every hundred dollars of the clear market value of such property, and at and after the same rate for any less amount, * * * for the use of the state * * * provided that an estate which may be valued at a less sum than five hundred dollars shall not be subject to such duty or tax.'

"The surrogate held that it was the intention of the legislature that all taxable estates should be exempt from taxation to the extent of \$500, and he, therefore, allowed a deduction from each of the legacies in question of that amount, leaving the balance for assessment for purposes of taxation under the act. The General Term reversed this decision; holding that the legislative intent was to limit the estates upon which the tax should be imposed.

"We think their decision was clearly right.

"The legislature is not controlled as to the extent of taxation of property within the state, and in imposing a special tax upon all persons within a certain class, there is no violation of fundamental principles. The tax is one which applies to all cases which are described in the act. * * *

"(Page 379.) What it has done in this act of legislation is to impose a certain tax in every case where there is a succession to, or devolution of property of the value of \$500 and upwards. As the tax is made to apply to every estate, which is bequeathed or devised to, or inherited by, the persons specified in the act, it is equal and, therefore, free from objection on legal grounds. It is not correct to say that this act is one which grants exemption from taxation in certain cases. It defines the cases in which the taxing power is applied as new objects for taxation. If the inheritance, or the testamentary gift, amounts to \$500 or more, then the act operates to create a liability in favor of

the state to the extent mentioned; but if it is less, the act is wholly inoperative."

Matter of Swift, 137 N. Y. 77-83; Matter of Ullman, 137 N. Y. 403-407; Matter of Jourdan, 206 N. Y. 653; Matter of Scott, 208 N. Y. 602; Matter of Mason, 69 Misc. 280-285, and State Comptroller's opinion, dated January 27, 1913, 1 State Department Reports, 559.

As to rates of tax and exemptions since amendment by Laws of 1911, chapter 732, in effect July 21, 1911, vide § 221a and Matter of Schwarz, 209 N. Y. 000, and text *supra*, page 40. As to non-resident estates since 1911 amendment vide text *supra*, page 133.

1891.

MATTER OF JOHN GUY VASSAR, 127 N. Y. 1.

Testator died October 27, 1888. The personal estate of the deceased amounted to upwards of two million dollars, and at the time of the hearing before the appraiser the same had been increased by the collection of interest upon investments made in the amount of about \$150,000, so that the question as to whether the increase is subject to the tax is one of some importance. Chapter 713 of the Laws of 1887 provided: "Section 1. After the passage of this act, all property which shall pass by will or by the intestate laws of this state from any person who may die seized or possessed of the same * * * shall be subject to a tax of five dollars on every hundred dollars of the clear market value of such property." The court say, page 7: "It will be observed that the property here referred to is that of which a person may die *seized or possessed*. By section 2 of the act is provided that 'When any grant, gift, legacy or succession upon which a tax is imposed by section first of this act shall be an estate, income or interest for a term of years, or for life, or determinable upon any future or contingent event, or shall be a remainder, reversion or other expectancy, real or personal, the entire property or fund by which such estate, income or interest is supported, or of which it is a part, shall be appraised immediately after the death of the decedent at what was the fair and clear market value thereof at the time of the death of the decedent, in the manner hereinafter provided, and the surrogate shall thereupon assess and determine the value of the estate, income or interest subject to said tax in the manner provided in section 13 of this act, and the tax prescribed by this act shall be immediately due

and payable to the treasurer of the proper county,' etc. And again, section 4, 'All taxes imposed by this act, unless otherwise herein provided for, shall be due and payable at the death of the decedent, and if the same are paid within eighteen months, no interest shall be charged and collected thereon, but if not so paid, interest at the rate of ten per cent. per annum shall be charged and collected from the time said tax accrued; provided that if said tax is paid within six months from the accruing thereof, a discount of five per cent. shall be allowed and deducted from said tax.'

"We shall not stop to consider whether the bequests in question are those mentioned within the provisions of section 2 of the act referred to, for the reason that if they are not covered by the provisions of that section, they certainly are by that of section 4; but the provisions of the former section indicate the legislative intent as bearing upon the question under consideration, for it requires the appraisal to be made immediately after the death of the decedent at the fair market value of the property at the time of the death, and makes the tax immediately due and payable, and to the same effect are the provisions of section 4, for therein the taxes imposed are made due and payable at the death. If they are not paid within eighteen months, interest thereon at the rate of ten per cent. may be charged and collected, but if they are paid promptly or before the expiration of six months, a discount of five per cent. is allowed. It appears to us that these provisions are inconsistent with the claim that the tax is not to be assessed until the final accounting of the executors, and then is to be assessed upon the interest that has been collected upon the funds in their hands. This would not only deprive the legatees of the right to avail themselves of the discount of five per cent., but would subject them to the liability of being taxed upon interests thereafter accruing. The better and more reasonable construction of the statute is that the property of which the person died seized or possessed is subject to the tax; that the increase or interest thereafter obtained by the executors is property of which the testator was not seized or possessed at the time of his death; that the property should be appraised and the tax assessed as soon after death as practicable and that the tax should then become immediately due and payable; that the provision for charging interest thereon, in case it is not paid, is in lieu of any increase or interest that may be derived from

the estate by the executors." The court further say, page 12: "The taxes imposed by the Collateral Inheritance Act are special and not general."

Vide §§ 222, 223 and 230; Matter of Westurn, 152 N. Y. 93-101; Matter of Miller, 77 App. Div. 473-480; Matter of Starbuck, 63 Misc. 156-160, affirmed 201 N. Y. 531.

Matter of Thorne, 44 App. Div. 8-10, affirmed, 162 N. Y. 238.

1891.

MATTER OF WORTHINGTON ROMAINÉ, 127 N. Y. 80.

Intestate died in September 1888, a resident of Virginia. The court say, page 83: "The original act provided that after the passage thereof 'All property which shall pass by will or by the intestate laws of this state from any person who may die seized or possessed of the same while being a resident of the state, or which property shall be within the state,' to any one other than certain excepted persons nearly related to the decedent, should be subject to a tax of five dollars upon the hundred 'of the clear market-value of such property.' (Laws of 1885, chap. 483, section 1.) When this statute came before the courts for construction, it was held not to apply to property within the state, either real or personal, that passed by will or intestacy from a non-resident decedent to collateral relatives or strangers, and that it was limited in its effect to property so passing from resident decedents. (Matter of Enston, 113 N. Y. 174; Matter of Tulane, 51 Hun, 213; Matter of Clark, 9 N. Y. Supp. 444.) In 1887, however, the legislature amended the act so that it provided that 'all property which shall pass by will or by the intestate laws of this state, from any person who may die seized or possessed of the same while a resident of this state, *or if such decedent was not a resident of this state at the time of death*, which property, or any part thereof, shall be within this state,' etc. (Laws of 1887, chap. 713, section 1.)"

The court also say, page 86: "The fiction of law that personal estate has no *situs* away from the person or residence of its owner is done away with, to a limited extent and for a specified purpose, and the truth is substituted in its stead as the rule of action."

Held, that where the property of a non-resident (page 89) "is habitually kept, even for safety, in this state, that the statute applies both in the letter and spirit. Such property is within

this state in every reasonable sense, receives the protection of its laws and has every advantage from government, for the support of which taxes are laid, that it would have if it belonged to a resident."

Vide *Matter of Houdayer*, 150 N. Y. 37-40; *Matter of Embury*, 19 App. Div. 214-216, affirmed, without opinion, 154 N. Y. 746; *Matter of Gibbes*, 84 App. Div. 510-512, affirmed, without opinion, 176 N. Y. 565; *Matter of James*, 144 N. Y. 6-12; *Matter of Phipps*, 143 N. Y. 641; *Blackstone v. Miller*, 188 U. S. 189; *Matter of Starback*, 63 Misc. 156-160, affirmed in 201 N. Y. 531; *Matter of Burr*, 16 Misc. 89-90; *Matter of Leopold*, 35 Misc. 369; *Matter of Clark*, N. Y. Law Journal, February 9, 1912; *Matter of Swift*, 137 N. Y. 77-83.

Chapter 732, Laws of 1911, in effect July 21, 1911, provides that when the decedent is a non-resident of the state at the time of his death the only transfer of property subject to the tax is the transfer of tangible property within the state (subdivisions 2 and 4, § 220). The said 1911 amendment to § 243 provides that the words "tangible property" shall be taken to mean "corporeal property such as real estate and goods, wares and merchandise, and shall not be taken to mean money, deposits in bank, shares of stock, bonds, notes, credits or evidences of an interest in property and evidences of debt."

1892.

MATTER OF CORNELIA M. STEWART, 131 N. Y. 274.

Testatrix died October 26, 1886. The court say, page 285: "Intermediate the death of the testatrix and the expiration of the eighteen months, proceedings were instituted for the revocation of the probate of the will, which were not terminated until January 16, 1890. Section 2650 of the Code suspends action by an executor after he has been served with a citation upon a petition to revoke probate, until a decree is made in the proceeding, except for the preservation of the property, the collection and payment of debts, and acts expressly authorized by the surrogate upon notice to the petitioner. It is claimed that interest should not be charged during this period. The 5th section of the act is an answer to this claim. It was the later statute and it enacts that a modified rate of interest shall be charged where 'by reason of claims made upon the estate, necessary litigation, or other unavoidable cause of delay the estate of the decedent' cannot be settled, etc. The delay in this case was in consequence of litigation. The legislature provided for cases like this by reducing the rate of interest during such delay. The courts cannot interfere." ¹

The court say, page 278: "The testatrix gave one-half of

her residuary estate to Henry Hilton, in trust, to apply in his discretion such portion thereof as he might deem expedient to the erection and endowment of a seminary of learning for women, and the erection of buildings and institutions connected with the Memorial Cathedral Church of Garden City, Long Island, with power to appoint any part of the trust estate which in his opinion would not be needed or required for the purposes of the trust, among any of the legatees named in the will. This power was exercised for the first time on the 16th day of January, 1890, three years and more after the death of the testatrix.

"* * * (Page 278.) The trustee, after applying a portion of the trust estate to the purposes of the cathedral, appointed the balance of the trust fund, amounting to more than two million dollars, among ten of the nineteen legatees, one-tenth of which (being the sum of \$248,540.16) was appointed to Charles J. Clinch, a nephew of the testatrix.

"* * * (Page 279.) The contention that the sum received by Charles J. Clinch under the power of appointment is not taxable, is placed upon two propositions, first, that until the power of appointment was actually exercised, Charles J. Clinch had at most a mere possibility that he might share in the distribution, and had no estate vested or contingent in the fund, and that this possibility or chance was incapable of any valuation at the decedent's death, as he might receive something or nothing, depending on the will of the donee of the power, and second, that the statute contemplates the taxation of such interests only as are capable of valuation at the death of the decedent, and provides no method for taxing an uncertain and contingent interest which may never vest in possession. * * * .

"(Page 281.) The obvious intent of the legislature was to impose a tax on every interest, immediate or future, derived under a testator or intestate, not embraced in the exception.

"* * * (Page 282.) There are two sections in the act of 1885, which prescribe the procedure for fixing the valuation and assessing property subject to taxation. These are sections 2 and 13. Section 2 relates to a special class of cases, viz., cases where property is devised or bequeathed for life, or a term of years, to a person whose interest is exempted from the payment of any tax, with remainder over to collaterals or strangers in blood. In these cases the section prescribed that

the (entire) property passing under such a devise or bequest shall be appraised 'immediately after the death of the decedent, at what was the fair market value thereof at the time of the death of the decedent,' and after deducting the value of the estate for life or years, that the tax prescribed by the act on the remainder 'shall be immediately due and payable.' Provision is made that the party beneficially interested in the property chargeable with the tax may give a bond to pay the tax when he may come into the actual possession and enjoyment. This section contains the only provision to be found in the act prescribing in terms the time when an appraisal shall be made, or which directs that the value of the subject of the tax shall relate to 'the death of the decedent.' The section obviously has no relation to the case now in question. * * * Section two has reference to a specified class of cases only in which the case now in question is not included. The section primarily relates to certain legal vested estates for life or years, and remainders limited thereon, when the value of both estates can be determined at the death of the testator. We must look elsewhere to ascertain how the property is to be valued and the tax determined in the numerous other cases arising on wills, not embraced in the class specified in section two.

"Section 13 is a general section prescribing the method of appraising and valuing property subject to the payment of a tax under the act. By that section the surrogate is authorized to appoint an appraiser of such property 'as often and whenever occasion requires,' who, at a time and place appointed, of which notice is to be given, shall 'appraise the same at its fair market value,' and make his report, from which the surrogate shall, 'forthwith assess and fix the then cash value of all estates, annuities and life estates, or terms of years growing out of said estate, and the tax to which the same is liable.' It is to be noticed that this section does not, as does the second section, require the valuation to be made immediately upon the death of the decedent; on the contrary, it contains the significant words that an appraiser may be appointed 'as often as and whenever occasion may require.' Nor does section 13 prescribe that the property appraised thereunder shall be appraised 'at what was the fair market value thereof at the time of the death of the decedent,' as is required in the cases falling under the second section.

"Under section 13 the appraiser is to appraise the property 'at its fair market value,' and the surrogate, on the coming in of the report, is to assess and fix the 'then cash value' of all the estates, etc., upon which the tax is chargeable. There are no limiting words such as are found in section 2. Section 13 is the section which, in the great majority of cases, governs, since the cases arising under section 2 form but a small proportion of the cases within the provisions of wills.

"* * * (Page 284.) The 13th section includes cases like the present, and that contingent interests given by a will, which after the death of the testator are converted, by the happening of the event upon which they are limited, into actual vested estates, may then be appraised and taxed under the provisions of section 13. It is true that section 4 seems to contemplate that all taxes are ascertainable at the death of the decedent, since it declares that 'they shall be due and payable' at that time, and provides for charging interest thereon from 'the time the tax accrued.' We think the implication from this section ought not to overbear the intention of the legislature indicated in section one, to subject all interests derived under wills to taxation, except those within the exception, nor prevent such a construction of section 13 as will bring the present case within its purview."

Vide §§ 222 and 230; *Matter of Langdon*, 153 N. Y. 6-9; *Matter of Embury*, 19 App. Div. 214-216, affirmed, without opinion, 154 N. Y. 746; *Matter of Vanderbilt*, 172 N. Y. 69-71; *Beers v. Glynn*, 211 U. S. 477-483; *Matter of Harbeck*, 161 N. Y. 211-218; *Matter of Vanderbilt*, 50 App. Div. 246-251; affirmed, on opinion below, 163 N. Y. 597; *Matter of Swift*, 137 N. Y. 77-83; *Matter of Ullman*, 137 N. Y. 403-408; *Matter of Curtis*, 142 N. Y. 219-223; *Matter of Hitchins*, 43 Misc. 485-493, affirmed, without opinion, 181 N. Y. 553.

¹ Vide cases cited sub *Interest*, *post*, page 721.

1893.

MATTER OF EDWARD D. G. PRIME, 136 N. Y. 347.

Testator died a resident April 7, 1891, and no appraisement was made and no tax was assessed or fixed until October 12, 1891, but on the previous April 20, 1891, the act of 1891 was passed, by which act the first section of the before existing act (the only section imposing a tax) was "amended to read as follows." Appellants claim, that the amendment was a repeal

of the old first section of the law, and the enactment of a new section in its place, not retroactive, and hence, that in October, 1891, when the appraisement was made and the tax was fixed and assessed by the surrogate, there was no law in existence which authorized a tax on a legacy which passed upon a death which occurred April 7, 1891.

By his will testator gave certain legacies to two foreign corporations, the Presbyterian Board of Relief and the American Board of Commissions of Foreign Missions. The court say, page 355: "The conclusion we have reached makes it unnecessary to consider the point whether, if the act of 1891 repealed the first section of the act of 1887, the repeal operated to prevent the subsequent assessment and collection of a tax on the estate of decedents who died intermediate the act of 1887 and the act of 1891. The more interesting question, and the one of greater importance from the larger interests involved in its determination, arises on the appeal of the charitable corporations. * * * (Page 362.) It is the policy of society to encourage benevolence and charity but it is not the proper function of a state to go outside of its own limits and devote its resources to support the cause of religion, education or missions for the benefit of mankind at large. The argument may have force, that the state might, consistently with its proper function, give immunity from taxation to some of the foreign corporations engaged in the work of education or charity. But however this may be, we are convinced that the statute of 1891 has no application to foreign corporations, and having reached that conclusion, our duty is ended."

Chapter 732, Laws of 1911, in effect July 21, 1911, amended § 221 by doing away with the distinction between domestic and foreign corporations; vide § 221.

Matter of Swift, 137 N. Y. 77-88; Matter of Ullmann, 137 N. Y. 403-408; Matter of Merriam, 141 N. Y. 479-484, sustained in 163 U. S. 625, sub nom. *United States v. Perkins*; Matter of Balleis, 144 N. Y. 132-133; Matter of Althause, 63 App. Div. 252-256, affirmed, without opinion, 168 N. Y. 670; Matter of Wolfe, 23 Misc. 439. Matter of Crittenton, N. Y. Law Journal, April 5, 1911, in which it was held that a corporation created by Congress was a foreign corporation within the meaning of § 221 prior to 1911 Amendment.

Matter of McCartin, N. Y. Law Journal, December 5, 1913, opinion quoted *post*, page 608.

1892.

MATTER OF CHARLES H. BUTLER, 136 N. Y. 649, affirms, without opinion, 58 Hun, 400.

Testator died September, 1889. He bequeathed to an adopted son a legacy of the value of \$50,000, and the surrogate held the transfer taxable. The statute in force at death of testator provided, *inter alia*: "After the passage of this act all property which shall pass by will or by the intestate laws of this state from any person * * * other than to or for the use of his or her father, mother, husband, wife, child, brother, sister, * * * or any child or children adopted as such in conformity with the laws of the state of New York, or any person to whom the deceased for not less than ten years prior to his or her death stood in the mutually acknowledged relation of a parent * * * shall be and is subject to a tax of five dollars on every hundred dollars of the clear market-value of such property."

The court say, page 402: "The section is somewhat awkwardly constructed, but the intention of the legislature to exempt adopted children from the operation of the law is plainly manifested. * * * The statute does not require the proceedings for adoption to be under the laws of this state or within this state, but to be in conformity with them, to be like them and to correspond in character and manner with them, wherever they are conducted; and an examination of the proceedings in Boston for the adoption of this child shows that they conform substantially to the requirements of our statute. There is no reason for a severe construction of this statute. This boy was legally adopted under laws substantially similar to our own, so far as the mode of procedure is concerned, and that is sufficient to answer the requirements of this law. Moreover, the deceased stood in the mutually acknowledged relation of a parent to this appellant for eleven years and a half prior to his death. No evidence of adoption is required by this portion of the statute, but mutual acknowledgment, and that is proven in this case by all the facts and circumstances which cluster round these parties from the commencement of their relation to the death of the testator."

Held, that legacy was not subject to tax.

Vide subdivision 1, § 221a; Matter of Miller, 110 N. Y. 216; Matter of Cook, 187 N. Y. 253-261; Matter of Duryea, 128 App. Div. 205; Domestic

Relations Law, § 114. As to burden of proof vide *Matter of Fisch*, 34 Misc. 146.

Chapter 215, Laws of 1891, in effect April 20, 1891, first taxed transfers of personal property to persons of 1% class and transfers of real property to such persons were first taxed March 16, 1903, chapter 41, Laws of 1903.

1893.

MATTER OF JAMES T. SWIFT, 137 N. Y. 77.

Testator died a resident July, 1890. At the time of his death, the testator's estate included certain real estate and tangible personal property in chattels, situated within the state of New Jersey. The law in force at the time of the decease of the testator is contained in chapter 713 of the Laws of 1887.

The court say, page 82: "The language of the act has been justly condemned, for being involved and difficult to read clearly. * * * (Page 84.) What has the state done, in effect, by the enactment of this tax law? It reaches out and appropriates for its use a portion of the property at the moment of its owner's decease; allowing only the balance to pass in the way directed by testator, or permitted by its intestate law." *Held*, that the transfer of real estate situated out of this state is not taxable, but that the transfer of personal property of a resident decedent, wheresoever situated, whether within or without the state, is subject to the tax.¹ The court saying as to the real estate, page 86: "Nor is the argument available that, by the power of sale conferred upon the executors, there was an equitable conversion worked of the lands in New Jersey, as of the time of the testator's death, and, hence, that the property sought to be reached by the tax, in the eye of the law, existed as cash in this state in the executor's hands, at the moment of the testator's death."

The court also say, page 87: "Another question, which I shall merely advert to in conclusion, arises upon a ruling of the surrogate with respect to appraisement, in connection with a clause of the will directing that the amount of the tax upon the legacies and devises should be paid as an expense of administration. The appraiser, in ascertaining the value of the residuary estate for the purpose of taxation, deducted the amount of the tax to be assessed on prior legacies. The surrogate overruled him in this, and held that there should be no deduction from the value of the residuary estate of the amount of

the tax to be assessed, either upon prior legacies, or upon its value. He held that the legacies taxable should be reported, irrespective of the provision of the will; and that a mode of payment of the succession tax prescribed by will is something with which the statute is not concerned. I am satisfied with his reasoning and can add nothing to its force. Manifestly, under the law that which is to be reported by the appraiser for the purpose of the tax is the value of the interest passing to the legatee under the will, without any deduction for any purpose, or under any testamentary direction.”²

Matter of Ullman, 137 N. Y. 403-408; Matter of Seaman, 147 N. Y. 69-75; Matter of Sherman, 153 N. Y. 1-6; *United States v. Perkins*, 163 U. S. 625-629; Matter of Hull, 111 App. Div. 322-325, affirmed, without opinion, 186 N. Y. 586; Matter of Ramsdill, 190 N. Y. 492-495; Matter of Smith, 150 App. Div. 805-807; Matter of Curtis, 142 N. Y. 219-223; Matter of Hoffman, 143 N. Y. 327-330; Matter of James, 144 N. Y. 6-12; Matter of Harbeck, 161 N. Y. 211-218; Matter of Pell, 171 N. Y. 48-53; Matter of Webber, 151 App. Div. 539-540; Matter of Kissel, 65 Misc. 443-444, affirmed, without opinion, 142 App. Div. 934; Matter of Baker, 67 Misc. 360-362; Matter of Dwight, N. Y. Law Journal, October 8, 1911, affirmed, without opinion, 149 App. Div. 912.

¹ Tangible property without the state not subject to tax since amendment by chapter 732, Laws of 1911, in effect July 21, 1911, §§ 220 and 243. Vide State Comptroller's opinion, dated May 13, 1913, 2 State Department Reports, 501, opinion quoted, page 119.

² Matter of Gihon, 169 N. Y. 443-447; Matter of Kennedy, 20 Misc. 531; Matter of Purdy, 24 Misc. 301-302.

1893.

MATTER OF CATHARINE L. WOLFE, 137 N. Y. 205.

Testatrix died in April, 1887. She bequeathed legacies to Grace Church of the City of New York and Metropolitan Museum of Art. The court say, page 209: "In June, 1887, her executors applied to the surrogate of New York county for the appointment of an appraiser, under the provisions of chapter 483 of the Laws of 1885, known as the Collateral Inheritance Tax Act, in order to ascertain the amount of the tax upon her various legacies. Such an appointment was made, and, upon the coming in of his report appraising the value of the decedent's property, the surrogate made an order confirming the report and assessing the tax upon various legacies; but he reserved the question of the liability to taxation of property of the estate disposed of in certain clauses, which

included these bequests, for further consideration and fixed a future day for hearing thereupon. Copies of the appraiser's report and of the surrogate's order were thereafter served upon the comptroller of the city. Upon the return day, fixed by the order for the hearing upon the question reserved, neither the comptroller nor the district attorney appeared and thereafter and on October the 29th, 1887, the surrogate made a decree reciting the proceedings had, etc., and adjudging, among other things, that the legacies in question here were exempt from taxation under the act. On May the 31st, 1888, the executors, relying upon said decree, paid over the legacies in full to the respective legatees. On October the 15th, 1890, and possibly, if not probably, moved thereto by our decisions in Catlin's case (113 N. Y. 134) and in Matter of Van Kleeck, (121 N. Y. 701), the district attorney of New York, by direction of the comptroller, filed his petition and instituted the present proceeding for the assessment and collection of a tax under the act. The legatees and appellants here pleaded the previous decision and decree of the surrogate as an adjudication of the matter and their payment of the legacies under the decree which had remained unappealed from and was in full force."

Held, that the surrogate being vested with the duty and authority to assess and fix the tax, a prior determination of that question is conclusive upon the comptroller and district attorney, and leaves no scope for the operation of sections 16 and 17 of the 1885 Act, except in the case of a refusal or a neglect to pay the tax which is due.

The court say, page 214: "In the present case, the surrogate's decree of October, 1887, was an adjudication upon the liability of these legacies to taxation, which was final, and was a complete bar to the maintenance of any subsequent proceeding by the district attorney to collect a tax." The court also say, page 213: "The doctrine of notice is one which finds application when it is sought to tax the property of the citizen. When he is to be assessed it is essential that he shall be given an opportunity to be heard, to establish a demand against him."

Vide §§ 221 and 235; Matter of Ullman, 137 N. Y. 403-407; Amherst College v. Ritch, 151 N. Y. 282-343; Weston v. Goodrich, 86 Hun, 194-200; Matter of O'Donohue, 44 App. Div. 186; Matter of David Kennedy, 113 App. Div. 4-6; Matter of Lansing, 31 Misc. 148-154; Matter of Daly, 34 Misc. 148-151.

Statute, §§ 230 and 231, now requires that notice must be given to State Comptroller.

As to exemptions vide *Matter of Mergentime*, 129 App. Div. 367, affirmed, on opinion below, 195 N. Y. 572; *Matter of McCormick*, 206 N. Y. 100-104.

1893.

MATTER OF AMELIA G. ULLMANN, 137 N. Y. 403.

Testator died in 1890. The court say, page 407: "Every officer charged with the duty of executing the taxing power, whether it be a surrogate or a town assessor, must necessarily decide, in a judicial capacity, important questions of law in order to perform the duties of his office. Ordinarily such decisions do not, like judgments in actions, conclude the parties as to the same question in subsequent proceedings instituted for some other purpose, although in all such proceedings for the assessment of the tax it ought to and doubtless would until reversed or set aside.

"The surrogate must decide whether any property of a deceased person has passed to another under a will or under the laws of intestacy before he can perform the duty imposed upon him. It may sometimes happen that the property of the deceased passes in both ways. The fact that there is a will, and that it has been admitted to probate, does not necessarily determine the ownership or the transmission of the property."

Held, page 408, "that the jurisdiction conferred by the statute upon the surrogate to hear and decide all questions in relation to the tax imposed by its provisions upon persons to whom property has passed from a decedent is, we think, broad enough to warrant the surrogate in holding, in a case like this, that the property which is the subject of the tax has not passed to the legatees or devisees under the will, but to the heirs at law or next of kin."

Vide § 228; *Weston v. Goodrich*, 86 Hun, 194-201; *Amherst College v. Ritch*, 151 N. Y. 282-343; *Matter of Smith*, 80 Misc. 140-143.

1893.

MATTER OF JOHN KNOEDLER, 140 N. Y. 377.

Testator died January 8, 1891. The court say, page 378: "The appellants object to the assessment of a tax under the collateral inheritance law upon that part of the estate of the

testator, amounting to \$65,000 and upwards, which is the proceeds of four life insurance policies, held by him at the time of his death. * * * Three of the policies were payable to the testator, his executors, administrators and assigns, and the fourth was a paid-up policy, payable to his legal representatives. * * *

(Page 380.) "The argument is made that it is only property which is liable to taxation under the general tax law of the state which can be taxed under the act relating to taxable transfers, and that, inasmuch as life insurance policies cannot be included in the valuation of a taxpayer's property under the general law, they cannot be considered in assessing a tax under the collateral inheritance law. The main premise upon which this proposition rests is manifestly inadmissible. The taxable transfer law has no reference or relation to the general law. The two acts are not in *pari materia*.¹ While the object of both is to raise revenue for the support of the government, they have nothing else in common. Nearly sixty years intervened between the passage of the earlier and the later statute, and the latter was enacted under different conditions from the former. It proceeds upon a new theory of the right of the government to tax and establishes a new system of taxation. It taxes the right of succession to property, and measures the tax in the method specifically prescribed. All property having an appraisable value must be considered, whether it is such as might be taxed under the general law or not. Many kinds of property might be enumerated which are not assessable under the general law, but which are appraisable under the collateral inheritance act. The definition of the different kinds of property which the legislature has incorporated in the general tax law, for the purposes of that law, cannot be imported into the collateral inheritance tax law upon any sound principle of statutory construction. It is, therefore, immaterial whether life insurance policies can be valued and assessed for taxation under the general law."

Held, that the amount of the policies was taxable.

As to life insurance in New York Company on life of non-resident, *Matter of Gordon*, 186 N. Y. 471; *Matter of Rhoads*, 190 N. Y. 525.

As to resident vide *Matter of Parsons*, 117 App. Div. 321; *Matter of Fay*, 25 Misc. 468; *Matter of Elting*, 78 Misc. 692.

¹ *Matter of Althause*, 63 App. Div. 252-254, affirmed, without opinion, 168 N. Y. 670; *Matter of Hellman*, 174 N. Y. 254-257.

1894.

MATTER OF WILLIAM W. MERRIAM, 141 N. Y. 479, sustained in 163 U. S. 625, sub nom. United States v. Perkins.

Testator died a resident January 30, 1889, and devised and bequeathed all his estate to the United States government.

The United States Supreme Court say, page 625: "This case raises the single question whether personal property bequeathed by will to the United States is subject to an inheritance tax under the laws of New York. * * * (Page 627.) While the laws of all civilized states recognize in every citizen the absolute right to his own earnings, and to the enjoyment of his own property, and the increase thereof, during his life, except so far as the state may require him to contribute his share for public expenses, the right to dispose of his property by will has always been considered purely a creature of statute and within legislative control. 'By the common law, as it stood in the reign of Henry II, a man's goods were to be divided into three equal parts; of which one went to his heirs or lineal descendents, another to his wife, and a third was at his own disposal; or if he died without a wife, he might then dispose of one moiety, and the other went to his children; and so, *e converso* if he had no children, the wife was entitled to one moiety and he might bequeath the other; but if he died without either wife or issue, the whole was at his own disposal.' 2 Bl. Com. 492. Prior to the Statute of Wills, enacted in the reign of Henry VIII, the right to a testamentary disposition of property did not extend to real estate at all, and as to personal estate was limited as above stated. Although these restrictions have long since been abolished in England, and never existed in this country, except in Louisiana, the right of the widow to her dower and to a share in the personal estate is ordinarily secured to her by statute.

"By the Code Napoleon, gifts of property, whether by acts *inter vivos* or by will, must not exceed one-half the estate if the testator leave but one child; one-third, if he leaves two children; one-fourth, if he leaves three or more. If he have no children, but leaves ancestors, both in the paternal and maternal line, he may give away but one-half of his property, and but three-fourths if he have ancestors in but one line. By the law of Italy, one-half a testator's property must be distributed equally among all his children; the other half he may leave

to his eldest son or to whomsoever he pleases. Similar restrictions upon the power of disposition by will are found in the codes of other continental countries, as well as in the state of Louisiana. Though the general consent of the most enlightened nations has, from the earliest historical period, recognized a natural right in children to inherit the property of their parents, we know of no legal principle to prevent the legislature from taking away or limiting the right of testamentary disposition or imposing such conditions upon its exercise as it may deem conducive to public good.

"In this view, the so-called inheritance tax of the state of New York is in reality a limitation upon the power of a testator to bequeath his property to whom he pleases; a declaration that, in the exercise of that power, he shall contribute a certain percentage to the public use; in other words, that the right to dispose of his property by will shall remain, but subject to a condition that the state has a right to impose. Certainly, if it be true that the right of testamentary disposition is purely statutory, the state has a right to require a contribution to the public treasury before the bequest shall take effect. Thus the tax is not upon the property, in the ordinary sense of the term, but upon the right to dispose of it, and it is not until it has yielded its contribution to the state that it becomes the property of the legatee. * * * (Page 630.) The act in question is not open to the objection that it is an attempt to tax the property of the United States, since the tax is imposed upon the legacy before it reaches the hands of the government. The legacy becomes the property of the United States only after it has suffered a diminution to the amount of the tax, and it is only upon this condition that the legislature assents to a bequest of it."

It was also held that its stocks of foreign corporation owned by resident decedent were subject to transfer tax (141 N. Y. 479-485).

Vide subdivision 1, § 220 and subdivision 2, § 221a.

Matter of James, 144 N. Y. 6-12; Matter of Cullum, 145 N. Y. 593; People *ex rel.* U. S. A. P. P. Co. *v.* Knight, 174 N. Y. 475-482; Matter of Smith, 150 App. Div. 805-807.

1894.

MATTER OF CLARISSA E. CURTIS, 142 N. Y. 219.

Testatrix died November 3, 1886. The court say, page 221: "The testatrix, by the terms of her will, created a group of trusts for the benefit of her two daughters and two named grandchildren, each trust running for the life of the beneficiary; and then devised and bequeathed remainders over to such of her named nephews and nieces as should be living at the time of the successive termination of each of such trusts, or if any such beneficiaries should then be dead, to their then living issue. * * * The surrogate decreed that the remainders were liable to taxation under the Collateral Inheritance Act as it stood in 1885, and caused the values to be appraised and the amounts of the tax to be fixed. On appeal to the General Term that decree was reversed, the court deciding that the appraisal and assessment were premature, and from that decision the present appeal is brought."

The court say, page 222: "Until the end of the trusts it cannot be determined whether the property represented by the remainders will be taxable at all: that is to say, whether it will pass actually and beneficially to persons in whose hands it will be taxable, or to others in whose possession it will be exempt. If, in the end, these remainders go to the nephews and nieces a tax will be imposed, but if, instead of passing to them, the remainders should go to the children and grandchildren they would be exempt from taxation. Under this will, however we may speculate as to the technical location of the fee pending the running of the trusts, the actual and beneficial interest in remainder may pass wholly to the two daughters by intestacy. * * * The remainders vested in the nephews and nieces at once upon the death of the testatrix and so became contingent interests taxable under the law. If that technical vesting be admitted, what so passed was rather a theoretical possibility than a tangible reality, for the life estate was in the trustee of the daughters carrying the whole beneficial use; there was no power over it in the contingent remainderman; and the nominal and technical fee might never become a taxable estate. It was never intended by the law to tax a theory having no real substance behind it.

(Page 223.) " * * * This case illustrates one result of the contrary doctrine. Walter Racey, a nephew named, has

died without issue. He never took anything beneficial under the will and his estate can take nothing, and yet it is assessed for about one thousand dollars, which it is said will more than exhaust all that he left, and in return for which he received actually nothing and theoretically only an unsubstantial legal fabric.¹ That is too unjust to be borne.

"I do not at all criticize the wisdom of the law which imposes a tax upon the succession of collaterals to estates which usually they did not help to earn and very often do not deserve. On the contrary, I deem the law thoroughly wise and just; but it does not at all follow that collaterals should be taxed upon property which they never received and upon what is in form but a theory and in fact only an illusion. The law itself gives abundant evidence in its language of the intent to subject only real and beneficial interests to taxation, and nothing in its policy justifies the imposition of such a burden where no corresponding benefit has been received. * * * It may possibly be that where the only contingency of the future is upon which of several named persons or classes of persons, all of whom are liable to suffer the taxation the beneficial interests will ultimately devolve, the appraisal and assessment need not be postponed, though even that is hardly a prudent construction, but need not now be discussed, yet where the contingency touches the taxable character of the succession, where it is only in the chance of uncertain events that the beneficial interests will finally alight where they will be taxable at all, a delay until the contingency is solved is both just and necessary."

Vide §§ 222, 230 and 241; and discussion of amendments in *Matter of Burgess*, 204 N. Y. 265, and sub Remainders.

Matter of Seaman, 141 N. Y. 69-75; *Matter of Davis*, 149 N. Y. 539-549; *Matter of Langdon*, 153 N. Y. 6-9; *Matter of Hitchins*, 43 Misc. 485-493, affirmed, without opinion, 181 N. Y. 553; *Matter of Hoffman*, 143 N. Y. 327-334; *Matter of Roosevelt*, 143 N. Y. 120-124; *Matter of Dows*, 167 N. Y. 227-233, sustained in 183 U. S. 278, sub nom. *Orr v. Gilman*; *Matter of Babcock*, 37 Misc. 445-448, affirmed, without opinion, 81 App. Div. 645.

¹ *Matter of White*, 208 N. Y. 64.

1894.

MATTER OF DANIEL B. FAYERWEATHER, 143 N. Y. 114.

Testator died November 15, 1890. A contest arose over the probate of the will. The application of the executors to

the surrogate for a remission of the penalty imposed by law for the non-payment of the whole of the tax within eighteen months of the date of the death of the decedent, resulted favorably to the executors, and the surrogate adjudged that the interest to be charged on the balance of the tax then imposed should be at the rate of six per cent. from the 15th of May, 1892 (eighteen months subsequent to the death of the decedent), and the application of the comptroller for an order charging interest on that amount at the rate of six per cent. from the death of the testator (Nov. 15, 1890), as provided by chap. 399 of the Laws of 1892, was denied.

The court say, page 117: "Under the act of 1887 (chap. 713), which was in force at the time of the death of the decedent, * * * it was provided that the penalty of ten per cent. imposed by the fourth section should not be charged where in cases by reason of claims made upon the estate, necessary litigation or other unavoidable cause of delay, the estate of a decedent could not be settled at the end of the eighteen months from the death of the decedent, and in such cases only six per cent. per annum should be charged from the expiration of the eighteen months until the cause of delay should be removed. At the time, therefore, when the tax upon this estate accrued or became due, viz., upon the death of the decedent the law gave the executors of his will eighteen months in which to pay the tax without the addition of any interest whatever, and ten per cent. interest from the time this tax accrued was imposed as a penalty for non-payment unless it was excused under the provisions of section 5 above quoted, and in that case interest only at the rate of six per cent. from the expiration of the eighteen months, until the cause of delay was removed, was imposed. * * * While the law was in this condition the legislature on the first day of May, 1892, passed the act, chapter 399 of the laws of that year. The statute repealed the prior acts upon the subject of taxation of collateral inheritances and itself made full provision therefor. It altered the fifth section of the act of 1887, above alluded to, by providing that if the penalty of ten per cent. interest on overdue taxes was not charged, then interest at the rate of six per cent. per annum should be charged from the date of the decedent's death. The reasons for not charging the penalty of ten per cent. were left the same in the new as in the old statute. Section 24 of the new or repealing act contained a saving clause providing that

the repealing clause should 'not affect or impair any act done or right accruing, accrued or acquired, or liability, penalty, forfeiture or punishment incurred prior to May 1, 1892, under or by virtue of any law so repealed.' It will be seen that the repealing act was passed a few days before the expiration of eighteen months subsequent to the death of the decedent."

Held, page 119: "If there were a doubt upon the question it should be resolved in favor of the taxpayer as represented by the executors and against the taxing power; and that the order of the surrogate should be affirmed."

Vide § 223, and cases cited sub Interest.

Vide *Amherst College v. Ritch*, 151 N. Y. 282-342; *Matter of Cooley*, 186 N. Y. 220-227; *Matter of Mergentine*, 129 App. Div. 367-374, affirmed, on opinion below, 195 N. Y. 572; *Matter of de Peyster*, N. Y. Law Journal, January 21, 1913, affirmed, without opinion, 156 App. Div. 938.

1894.

MATTER OF CORNELIUS V. S. ROOSEVELT, 143 N. Y. 120.

Testator died September 30, 1887. After certain specific legacies to his wife, the testator disposed of his residuary estate as follows: The entire amount to be held by the executor and the executrix in trust, to pay the income thereof to his wife during her life; at her death seven life annuities are given. On the decease of the wife, the estate is given, subject to the payment of the annuities, to twelve nephews and nieces.

The court say, page 122: "Two questions are presented for our determination, *viz.*: First, are the annuities created by the will such property, in a legal sense, as to be presently taxable, and can their fair and clear market value at the time of the death of the testator be ascertained; second, is the fair and clear market value at the time of testator's death, of the estates in remainder ascertainable, and is the tax thereon due at once? * * * It is not to be assumed that the legislature intended to compel the citizen to pay a tax upon an interest he may never receive, and the reasonable construction of this statute leads to no such unjust result. It does not follow because the legislature taxes persons beneficially entitled to property or income, in possession or expectancy, that a tax was thereby imposed upon an interest that may never vest; until that time arrives the power to tax does not exist. The testator

has created seven life annuities, if the annuitants survive his wife, and there can be no vested interest in any of them until the happening of that event. All may survive—a portion may be living—everyone may be dead. To hold such a possibility presently taxable, and its value capable of immediate computation, shocks the sense of justice. * * * (Page 124.) The legislature, in the act of 1892, has given a practical construction to its previous legislation on this subject when it provides that where the fair market value of the property or interest cannot be ascertained at the time of the transfer, the tax shall become due and payable when the beneficiary shall come into actual possession or enjoyment. (Chapter 399, Laws of 1892, section 3.)”

Held, that the case must be decided under the Laws of 1887 in force at the time of testator's death, and that neither the annuities nor the remainders were presently taxable.

Vide *Matter of Vanderbilt*, 172 N. Y. 69-77; *Matter of Brez*, 172 N. Y. 609; and §§ 222, 230 and 241; *Matter of Westurn*, 152 N. Y. 93-100; *Matter of Dows*, 167 N. Y. 227-234; *Matter of Hoffman*, 143 N. Y. 327-334; *Matter of Pell*, 171 N. Y. 48-54; *Matter of Meyer*, 83 App. Div. 381-384; *Matter of Tracy*, 179 N. Y. 501-508; *Matter of Babcock*, 37 Misc. 445-448, affirmed, without opinion, 81 App. Div. 645; *Matter of Eldridge*, 29 Misc. 734-738; *Matter of Stuart*, N. Y. Law Journal, May 10, 1913, opinion quoted sub *Power of Appointment*, page 772.

1894.

MATTER OF ELLA S. HOFFMAN, 143 N. Y. 327.

Testatrix died November 7, 1892.

Held, that Laws of 1892, chapter 399, changed the former rule, and that the interest of the mother of decedent in a legacy was taxable at one per cent. (page 333), “although itself of a value of less than ten thousand dollars, because the aggregate transfers by the will to taxable persons exceeded that amount.”

Vide § 221a; *Matter of Westurn*, 152 N. Y. 93-99; *Matter of Corbett*, 171 N. Y. 516; *Matter of Costello*, 189 N. Y. 288-292; *Matter of Jourdan*, 70 Misc. 159, affirmed, on dissenting opinion of Jenks, J. (151 App. Div. 8-11), in 206 N. Y. 653; *Matter of Schwarz*, 209 N. Y. mem.

Matter of Pullman, 46 App. Div. 574-578; *Matter of Pell*, 171 N. Y. 48-54; *Matter of Garland*, 88 App. Div. 380; *Matter of Babcock*, 37 Misc. 445-448, affirmed, without opinion, 81 App. Div. 645; *Matter of McMurray*, 96 App. Div. 128-130; *Matter of Fisher*, 96 App. Div. 133; *Matter of Birdsall*, 22 Misc. 180-181, affirmed, without opinion, 43 App. Div. 624; *Matter of De Graaf*, 24 Misc. 147-150; *Kitching v. Shear*, 26 Misc. 436-438; *Matter of Hallock*, 42 Misc. 473; *Matter of Mason*, 69 Misc. 280-285.

1894.

MATTER OF JOHN A. PHIPPS, 143 N. Y. 641, affirms on opinion below, 77 Hun, 325.

Elizabeth Fogg, a resident of this state, died on the 3d day of January, 1891, leaving a last will and testament, which was admitted to probate on the 15th of April, 1891. By her will she gave and devised all of her residuary estate, some of which consisted of real estate, but where situated does not appear, equally to Hiram Fogg, of Bangor, Maine, and John A. Phipps, of Boston, Mass. In January, 1892, Phipps died at said Boston, leaving a will which on February 1, 1892, was duly admitted to probate in the county of Suffolk, Mass., the domicile of the decedent at the time of his death. The legacy to Phipps was never paid to him, nor was it in a condition to be paid, he having died while Mrs. Fogg's estate was unsettled. This proceeding was instituted for the purpose of having it determined what amount of inheritance tax, if any, he was liable to pay upon the legacy bequeathed by Mrs. Fogg to his testator Phipps.

The question involved upon this appeal depends upon the construction to be given to section 1 of chapter 483 of the Laws of 1885 as amended by chapter 713 of the Laws of 1887, as amended by chapter 215 of the Laws of 1891, the last named statute being the one which was in operation at the time of the death of the testator, Phipps. The provisions of this act, as far as they are necessary to be considered in the disposition of this appeal, are as follows: "After the passage of this act, all property which shall pass by will or by the intestate laws of this state from any person who may die seized or possessed of the same while a resident of this state, or if the decedent was not a resident of this state at the time of his death, which property or any part thereof shall be within this state * * * shall be and is subject to a tax at the rate hereinafter specified."

The court say, page 327: "It is a familiar principle that the situs of personal property is presumptively the domicile of its owner, and its disposition is controlled by the laws of such domicile. But for certain purposes of taxation a different rule has obtained because of statutes passed to prevent non-residents having the protection of our laws for their property which is invested and kept within this state without contributing to the expense of such protection. And it is in the same

line of legislation that the statute of 1891 has been passed; and consequently where a resident of another state dies the owner of personal property which he has habitually kept and invested in this state, it is liable to taxation. But it has not yet been determined that if a resident of another state dies, having debts due him by residents of this state, that those debts are the subject of taxation as being the property of the decedent within this state.¹ That such property is not the subject upon which the act in question was intended to operate seems to have been intimated in the case of Swift (137 N. Y. 77), where the property the subject of taxation is likened to realty, being tangible and located within the limits of the state, as was the fact in reference to the estate of Romaine, 127 N. Y. 80. But a mere chose in action, a right to recover a sum of money, has never, as yet, been given the attribute of tangibility, and this seems to be all that Phipps had at the time of his death. He had a right to claim the amount of money which his share of the residuary estate of Mrs. Fogg would result in, nothing more; no particular piece of property, no particular sum of money, no particular representatives of money or property. And until this residuary estate was ascertained by an accounting of the executors, the legatee might not be even able to maintain an action for its recovery. It would appear, therefore, that a tax in this proceeding has been levied upon a legacy which not only had never been realized, but the right to the possession of which had never accrued. And if, as intimated in the Matter of Romaine, it was not the intention to attempt to levy a tax upon property, except such as the owner at the time of his death voluntarily permitted to remain in the state, how can such a tax be levied upon property which the decedent has never had it in his power to remove, if this unrealized legacy can be called property within this state? In other words, can this act be construed to cover a right at some future time to receive a sum of money, or to recover a debt?

"We think, clearly, it cannot, and that all that it was intended to cover was tangible property kept within this state by the decedent and that property which is transiently here, as upon the person or in the baggage of a man suddenly dying within this state, was never intended to be covered by the provisions of the act."

Vide cases cited in Matter of Clinch, 180 N. Y. 300-302 (1905).

Vide subdivisions 2 and 4 of § 220, and § 243. Matter of Zefita, 167 N. Y. 280; Matter of Lord, 111 App. Div. 152-6, affirmed, without opinion, 186 N. Y. 549, sustained in 211 U. S. 477, sub nom. *Beers v. Glynn*; Matter of Huber, 86 App. Div. 458-463; Matter of Wolfe, 89 App. Div. 349-351, affirmed, without opinion, 179 N. Y. 599; Matter of Leopold, 35 Misc. 369; Matter of Ames, 141 N. Y. Supp. 793-796; Matter of Clark, N. Y. Law Journal, February 9, 1912; Matter of Revere, id., January 28, 1913.

As to transfers in non-resident estates since 1911 amendment vide page 133.

1894.

MATTER OF FRANK LINSLEY JAMES, 144 N. Y. 6.

Testator died in April, 1890, a citizen of Great Britain and a non-resident of the state of New York. He left property in Great Britain, which was valued at \$477,630, and property in this country, which was valued at \$2,303,472.53. He gave legacies to collateral relatives and to charities which, in the aggregate, amounted to \$236,810. The residue of his estate was given to his executors, upon trusts for the benefit of his two brothers.

Stocks of foreign corporations, although deposited in this state, are not taxable in a non-resident's estate.

The court say, page 10: "The tax is laid only in the case where property of the non-resident decedent within the state passes to the legatee's collateral relative, or stranger in blood. Having, by the previous act of 1885, imposed a succession tax with respect to the property of residents of the state, the legislature added by amendment a further provision, which imposed the same tax with respect to any property of non-residents, that should be within the state and that should pass to persons or corporations, not excepted by the statute. * * * The property, which the testator died possessed of in Great Britain, is largely in excess of the amount given by him in legacies. Some portion of them has already been paid from the English estate and the executor has declared his determination of appropriating that part of the testator's property to their payment; so that the American estate shall constitute the residuary estate, disposed of by the will in favor of the testator's brothers. This he may rightly do and thus save the estate from the payment of the succession tax imposed by our laws."

Vide Matter of Bronson, 150 N. Y. 1-7; etiam subdivisions 2 and 3 of § 220 and § 243.

Subdivision 3 was added to the statute by chapter 310, Laws of 1908, in effect May 18, 1908, for the express purpose of doing away with the principle of this case. *Matter of Porter*, 67 Misc. 19, affirmed, without opinion, 148 App. Div. 896. *Vide etiam* ruling of Comptroller, January 20, 1913, in 1 State Department Reports, 605, quoted *supra*, page 152.

As to transfers in non-resident estates since 1911 amendment *vide* page 133.

Matter of Livingston, 1 App. Div. 568-570; *Matter of Cooley*, 186 N. Y. 220-7; *Matter of Ramsdill*, 190 N. Y. 492-4; *Matter of McEwan*, 51 Misc. 455; *Matter of Whiting*, 200 N. Y. 520; *Matter of Bishop*, 82 App. Div. 112-115; *Matter of Gibbes*, 84 App. Div. 510-513, affirmed, without opinion, 176 N. Y. 565; *Matter of Thayer*, 58 Misc. 117-119, affirmed, 193 N. Y. 430.

1894.

MATTER OF NICHOLAS BALLEIS, 144 N. Y. 132.

By his will the testator divided his residuary estate among certain religious corporations, organized and existing under the laws of other states, and it is contended for them that they are exempted from taxation under the provisions of chapter 399 of the Laws of 1892.

Held, (page 135) that the natural construction of the act of 1892 is to confine its operation to religious corporations created by the state.

The distinction between domestic and foreign corporations was eliminated by Amendment of § 221 by chapter 732, Laws of 1911, in effect July 21, 1911. *Matter of Prime*, 136 N. Y. 347; *Matter of Palmer*, 33 App. Div. 307, affirmed, on opinion below, 158 N. Y. 669; *United States v. Perkins*, 163 U. S. 625-630; *Matter of Athause*, 63 App. Div. 252-256, affirmed, without opinion, 168 N. Y. 670; *Matter of McCartin*, N. Y. Law Journal, December 5, 1913, opinion quoted *post*, page 608.

Matter of Crittenton, N. Y. Law Journal, April 4, 1911, held that a corporation created by Congress was a foreign corporation within the meaning of § 221 prior to 1911 amendment.

1895.

**MATTER OF GEORGE W. CULLUM, 145 N. Y. 593, affirms,
without opinion, 76 Hun, 610.**

A legacy to the United States is subject to a transfer tax.

Vide Matter of Merriam, 141 N. Y. 479, sustained in 163 U. S. 625, sub nom. *United States v. Perkins*; *Matter of Hamilton*, 148 N. Y. 310-313.

1895.**MATTER OF CHARLES H. EDWARDS, 146 N. Y. 380, affirms, without opinion, 85 Hun, 436.**

Decedent died a resident October 16, 1888. He had money on deposit in savings banks and kept the savings bank books in a tin box. On October 1, 1888, he delivered the tin box to James A. Ridden informing him that he was about to go to St. Luke's Hospital in the city of New York to have an operation performed for hernia, and that he was apprehensive he might die from the result of the operation, and said to him that if he did not return, he gave him the box and its contents. He went to the hospital on the next day, and on the fifth day of October an operation was there performed for Inguinal Hernia. The operation was not dangerous and was apparently successful. But on the sixteenth day of October he suddenly died from heart disease, with which he was afflicted when he went to the hospital. He had not returned from the hospital and had not recovered from the disease for which the operation was performed, nor from the results of the operation.

The court say, page 436: "The box contained sixteen savings bank books, seven of which represented accounts standing to the credit of Charles H. Edwards, and nine of which represented accounts standing to the credit of Thomas Edwards. Thomas Edwards was the father of Charles H. Edwards, and he died before Charles, who was his only relative and heir at law.

"The appraiser appointed by the surrogate valued the property at \$26,227.48 and that valuation was confirmed, and a tax was imposed upon the sum under the transfer statute of this state.

"The donee of the gift has appealed from the order and insists that there can be no tax upon the amounts represented by the bank books which stood in the name of Thomas Edwards, because Charles H. Edwards was not the owner of such accounts.

"The facts developed fail to justify that contention. The bank books were in the possession of Charles H. Edwards, and Ridden, the donee, received them from him. All the title he ever had to any of the bank books was derived from his donor, and that title was affirmed by the Court of Appeals. (*Ridden v. Thrall*, 125 N. Y. 572.)

"It is to be collected from the affidavit of Ridden, printed in the appeal book, that when he made a claim against the banks for the money standing to the credit of Thomas Edwards upon the nine bank books which contained his name, he was confronted by a claim of the representatives of the estate of Thomas Edwards, which he compromised by paying them the sum of \$5,000. Thereupon he received the money from the banks, and he received it as owner. He did not acknowledge the claim of the representatives of Thomas Edwards to the ownership of the money; he merely acknowledged them as adverse claimants, and made a compromise with them. In other words, he bought them off by paying them about one-fifth of their claim. He took no assignment from them, but as between him and the banks he evidently based his claim to the money upon the donation of Charles H. Edwards.

"The legal effect of his compromise with the representatives of the estate of Thomas Edwards was to quiet their claim and perfect his title to the property which he received from his donor.

"The appellant also contends that property passing by virtue of a gift *causa mortis* was not subject to taxation under the statute which was in force in 1888, when the gift in question was made. That statute was as follows: 'After the passage of this act all property which shall pass by will, or by the intestate laws of this state from any person who may die seized or possessed of the same while a resident of this state, * * * or any interest therein or income therefrom, which shall be transferred by deed, grant, sale or gift made or intended to take effect in possession or enjoyment after the death of the grantor or bargainor, * * * shall be and is subject to a tax' (Chap. 713, Laws of 1887, § 1).

"This statute evinces the intention of the Legislature to subject to a tax all property which should be transferred by a gift to take effect after the death of the grantor or bargainor.

"The title to the property passed to the appellant upon its delivery to him by the donor, but the gift was subject to revocation at all times during the lifetime of the giver, and in that sense it took effect in enjoyment after the death of his grantor. He could not have maintained an action for the recovery of the money represented by the bank books during the lifetime of Charles H. Edwards, and, therefore, he could not enter upon the full enjoyment of the gift until after his death.

"The gift therefore, seems to fall within the spirit and intention of the statute, and the tax was, therefore, properly imposed."

Vide subdivision 4, § 220. Matter of John Palmer, 117 App. Div. 360-367; Matter of Birdsell, 22 Misc. 180-195, affirmed, without opinion, 43 App. Div. 624. Vide cases cited sub Gift, and sub Compromise of Claim.

1895.

MATTER OF JOHN B. SEAMAN, 147 N. Y. 69.

Testator died in October, 1876, and by his will created life estates, with remainders over. There was no inheritance tax law when the will took effect and the estates which it created devolved, but the act of 1892 was in force when the life tenants died and possession of the remainders passed to the four children, and the question involved was whether that vesting in possession which occurred after 1892 was a transfer or succession then for the first time passing, and, so, taxable under the act, or, if not then first occurring, is at least made taxable by the explicit language of the statute.

Held, that the tax law did not operate retrospectively, and subject to taxation rights of succession which accrued before the tax law came into existence, and that the remainders of the four children were not taxable. Further held, that the portion of § 220 which is now embodied in subdivision 5 of the present § 220 does not refer to transfers by will or intestacy.

The court said, page 74: "It is obvious that a right of succession to the estates in remainder passed at once on the death of the testator to the four children and was a vested interest, although subject to be defeated or modified by subsequent contingencies. If the Inheritance Tax Law had been in existence at the date of the testator's death, these interests would have been taxable at once in the sense that the incumbrance of the right of the state would immediately attach. We have held that the tax is not upon the property which is transferred, but upon the right of succession which passes to the successor. (Matter of Swift, 137 N. Y. 88.) A right of succession passed to the four living children of George at the death of testator. It came from him; it was transferred by him; taking effect at his death; and passed then or never. But the right itself, although vesting in the successors at once, had its own peculiar character.

It could not ripen into possession or enjoyment until the death of the life tenants, and before that event was contingent solely as to the persons who should eventually take and the proportions to be observed. The legatees as a class were certain; the particular individuals were alone uncertain.

"But in just such a case difficulties arose in respect to the application of the Inheritance Tax Law, and received their solution in the case of *Curtis* (142 N. Y. 219). There, as here, a right of succession passed by the will, and at the date of the death of the testatrix, but was contingent as to the specific legatees; and it was seen that the immediate assessment and collection of a tax was impossible, because, as the law then stood, the succession of the children was exempt while the substituted succession of the nephews and nieces would be taxable; and we determined that the state must wait for the collection of its tax until the contingency was settled. I sought in that case to free the subject from the nice and difficult questions which attend the construction of wills, but, desirable as the result is, I am less confident than I was then of our ability to accomplish it. The case did not decide what is now contended on behalf of the respondent. In the counsel's brief it is described as holding that no beneficial interest passed, and that construction is reached by emphasizing half of a sentence with a neglect of the remaining half. The language used was 'the state cannot establish that any beneficial interest will pass to persons in whose hands it will be taxable, and until it can show that vital and necessary fact its right to the tax cannot arise.' To say that no beneficial interest passed into hands where it was taxable is very different from saying that no beneficial interest passed at all. The doctrine of the case and its manifest trend was that where the particular persons who were to have the beneficial possession were uncertain, the appraisal and collection must be adjourned until the uncertainty ended, but no new doctrine of the passing of the right of succession at a date later than that of the will was at all asserted.

"It is said, however, that the right of succession passing in remainder by the will was at best merely technical and nominal, and that the beneficial interest did not pass until the termination of the life estates. In one sense that is true. The right of succession to specific individuals might prove barren, and for that reason the claim of the state should be adjourned, and the law of 1892 fully recognizes and provides for such an adjourn-

ment, but a necessary and admissible delay in appraisal and collection is a very different matter from an assertion that no beneficial right of succession passed at all until after the decease of the life tenants. Next, the language of the act is relied on to effect the result, and it presents the real and difficult question requiring solution. Section one of the act imposes a tax upon all transfers of property to persons or corporations not exempt from taxation in the cases thereafter specified. The first subdivision embraces transfers by will or by intestacy from residents of the state. The second covers similar transfers of property within the state where the decedent was a non-resident at the time of his death. So far the transfers take place necessarily at the moment of death, for the will on the one hand and the intestate laws on the other operate and speak from that date, and any special provision about that was needless. But then comes the third subdivision introducing a new case. It reads thus: 'When the transfer is of property made by a resident or a non-resident when such non-resident's property is within this state, by deed, grant, bargain, sale or gift made in contemplation of the death of the grantor, vendor or donor, or intended to take effect in possession or enjoyment at or after such death.' At this point are evidently referred to grants or gifts *causa mortis*; that is, those affecting the result of a will or of intestacy by a grant or gift made during life, and so by a different process. The subdivision then proceeds: 'Such tax shall also be imposed when any such person or corporation becomes beneficially entitled, in possession or expectancy to any property or the income thereof by any such transfer whether made before or after the passage of this act.'¹ If we give this language a general and broad application, making it cover not only grants or gifts *causa mortis*, but also transfers by will or intestacy, we give the act a retrospective operation, and subject to taxation rights of succession which accrued before the statute came into existence. Of course we ought not to do that upon any doubtful or ambiguous expression. The words of the statute have their full and natural force when applied to the new case, immediately preceding, of grants or gifts *causa mortis*. A grantor may have conveyed and delivered his deed before 1892, in contemplation of death, and to take effect upon the happening of that event, or reserving a power of revocation, as well as the possession or enjoyment, during his lifetime, and the legislature certainly intended to put such a transfer on the same footing as one by will.

It is of no consequence that the will was executed before the statute if the death occurs after, and the same rule was intended to be explicitly applied to grants *causa mortis*.

"Though the deed precedes the tax law, as the execution of the will precedes that law in a possible case, yet the transfer in both instances is to date from the one event which makes it operative and effective. So much the legislature certainly intended, and so much can be admitted without making the statute operate retrospectively. Did the legislature mean more than that? The argument for an affirmative answer rests somewhat upon the expression: 'Shall be beneficially entitled in possession or expectancy.' But these four children, at the death of the testator, were 'beneficially entitled' to their remainders in 'expectancy.' An estate 'in expectancy' is one where the right to the possession is postponed to a future period, and it is 'beneficial' where the devisee takes solely for his own use or benefit, and not as the mere holder of the title for the use of another. So that the four children, as I have said, were beneficially entitled in expectancy, at the date of testator's death, to the estates which later came into their actual possession.

"In addition, it should be observed that the statute draws the distinction between the passing of the right of succession and the subsequent enjoyment, or termination of a defeasible quality. The right of the state attaches when the right of succession accrues, but may not be enforced in advance of that future possession and enjoyment, or indefeasible ownership, which identifies the persons who ought to pay. I think that is the meaning of the statute, although in some respects it is not free from ambiguity, and that we ought not to give it the retrospective effect for which the respondent contends."

Matter of Davis, 149 N. Y. 539-549; Matter of Langdon, 153 N. Y. 6-9; Matter of Gibson, 157 N. Y. 680, *post*, page 226; Matter of Edgerton, 35 App. Div. 125-129, affirmed, without opinion, 158 N. Y. 671; Matter of Masury, 28 App. Div. 580-587, affirmed, without opinion, 159 N. Y. 532; Matter of Bostwick, 160 N. Y. 489; Matter of Vanderbilt, 172 N. Y. 69-72; Matter of Baker, 83 App. Div. 530-534, affirmed, on opinion below, 178 N. Y. 575; Matter of Hitchins, 43 Misc. 485-493, affirmed, without opinion, 181 N. Y. 553; Matter of Birdsall, 22 Misc. 180-195, affirmed, without opinion, 43 App. Div. 624; Matter of Meyer, 83 App. Div. 381-386; Matter of Palmer, 117 App. Div. 360-366; Matter of Smith, 150 App. Div. 805-808; Matter of Abraham, 151 App. Div. 441-442; Matter of Webber, 151 App. Div. 539; Matter of Haight, 76 Misc. 380-382, affirmed, 152 App. Div. 228; Matter of Penfold, 142 N. Y. Supp. 678-680.

¹ As to subdivision 5, § 220, vide *Matter of Spaulding*, 49 App. Div. 541-549, affirmed, without opinion, 163 N. Y. 607; *Matter of Dows*, 167 N. Y. 227-233; *Matter of Pell*, 171 N. Y. 48-53; *Matter of Craig*, 97 App. Div. 289, affirmed, on opinion below, 181 N. Y. 551; *Matter of Abraham*, 151 App. Div. 441-443.

1896.

MATTER OF ROBERT RAY HAMILTON, 148 N. Y. 310.

Testator died August 23, 1890, and his will contained a bequest of \$10,000 to the city of New York for the purpose of providing an ornamental fountain to be placed in one of the public places in the city. The question is whether this bequest is subject to the succession tax upon legacies imposed by chapter 713 of the Laws of 1887.

The court say, page 314: "Public property is non-taxable, not upon the theory of exemption, but for the obvious reason that there is no law, and practically never can be a law, making it taxable. Of course a statute might be enacted including it within the operation of tax laws, but since the government would have to pay the tax itself such a law would be utterly useless.

"It is, therefore, quite plain that when the legislature excepted from the operation of the law now under consideration 'the societies, corporations and institutions now exempted by law from taxation,' it could not have referred to the state itself or to any of its political divisions. The reference obviously was to such associations, corporations or institutions as would have been included within its general terms, but for the exception or exemption itself. We have seen that the state or any of its political divisions would not have fallen within the terms of the law, and hence, no exemption was necessary in order to relieve them from its provisions. Exemption implies that the person or corporation to which it applies is or would otherwise be taxable. To include public property which is not, and in the nature of things cannot be taxable at all within the terms of an exemption act, would be to do a vain and useless thing which cannot be imputed to the legislature in the construction of the act in question.

"It is entirely reasonable, however, to suppose it was intended that when a municipal corporation takes a gift of personal property under a will that the gift is upon the same conditions and subject to the same burdens and deductions as would apply

in a case where the bequest was made to an individual. It must, we think, take the gift subject to the payment of the succession tax since it is not included within the exemption which permits certain other corporations to take without such conditions. The gift, less the tax, is what the city takes and the balance is to be paid into the state treasury."

Vide §§ 221b and 244. *Matter of Thrall*, 157 N. Y. 46; *United States v. Perkins*, 163 U. S. 625-631, sustaining *Matter of Merriam*, 141 N. Y. 479; *Matter of Moses*, 138 App. Div. 525-6. As to bequest to city in trust for educational purposes vide *Matter of Saunders*, 77 Misc. 54, affirmed, without opinion, 156 App. Div. 891.

1896.

MATTER OF KATHARINE J. S. DAVIS, 149 N. Y. 539.

Testatrix died a resident January 16, 1887. Transfer tax proceedings were not commenced until July 24, 1894.

The will provided, inter alia: "I give, devise and bequeath to my sister, Julia L. S. Ingraham, now wife of Duncan Ingraham, all my real and personal estate and property of what nature, name or kind the same may be, for her sole and separate use and benefit, for and during the term of her natural life, and from and immediately after her decease I do give, devise and bequeath the same to the children of my said sister who may be living at the time of her decease, share and share alike." The sister, Mrs. Ingraham, died February 2, 1894.

The transfer or inheritance tax must be governed by chap. 483 of the Laws of 1885, which was in force at her death, and its provisions must control as to the subject and the rate of taxation. The method of procedure for the enforcement of the Transfer or Inheritance Tax Law was somewhat changed by chap. 713 of the Laws of 1887 and chap. 399 of the Laws of 1892; the procedure is controlled by the statute as it existed at the time this proceeding was instituted. Hence, the rights of the parties depend upon the statute of 1885, while the method of procedure is governed by that of 1892.

The court say, page 546: "It has been often held by this court that the tax imposed is not a tax upon property, but upon the right of succession, and, hence, the true test of value by which the tax is to be measured, is the value of the estate at the time of the transfer of title, and not its value at the time of the transfer of the possession. * * *

"(Page 547.) Whatever of confusion exists in the authorities upon the subject seems to be due to a failure in some of the cases to properly distinguish between the time when, in a given case, the title passed and the time when the legatee became entitled to the possession of his estate under the will. Where the estate transferred has a fixed or ascertainable value at the time of the death of the grantor, testator or intestate the value at that time must be the basis of the appraisal whenever made; but if the person to whom the property passed cannot be known until the death of the life tenant, the tax cannot be imposed until after that event. Hence, the appellant's contention that the interest of the respondent was to be appraised as of the time when she acquired possession of the estate, cannot be sustained. Such was manifestly the opinion of the learned surrogate when he made the original decree in this proceeding, as he, with the assistance of the superintendent of the insurance department, ascertained the value of her estate at the time of the death of the testatrix, and established the value of the respondent's interest upon that basis. That portion of his decree was correct. He however, added to it a direction to collect interest at the rate of ten per cent. from January 16, 1887. In this he was clearly wrong. * * *

"(Page 547.) The respondent's appeal to the surrogate was only from that portion of the decree which directed the county treasurer to add interest at the rate of ten per cent. from January 16, 1887. She did not appeal from the appraisal or valuation of the estate, or from the assessment of the tax. Upon that appeal the learned surrogate was not authorized to reverse the entire decree, to make a new appraisal or valuation of the estate, or to interfere with any portion of it except that appealed from, as it is a well settled rule that only the parts of a judgment or decree which are appealed from can be reviewed.¹ * * *

As we have already seen, the right to the tax in this case did not arise until the death of the life tenant, for the reason that until that time it was neither certain that this property would be subject to an inheritance or transfer tax, nor that the respondent would ever be entitled to the possession of the property and thus become liable to be taxed upon her right of succession. Until that time no tax accrued. * * * Interest should be charged only from the time of the death of the life tenant to the time of payment."

¹ As to notice of appeal vide *Matter of Manning*, 169 N. Y. 449; *Matter*

of Cook, 194 N. Y. 400; Matter of Wormser, 51 App. Div. 441-445; Matter of Kennedy, 93 App. Div. 27-30; Matter of Stone, 56 Misc. 247-248.

Vide Matter of Sloane, 154 N. Y. 109-113; Matter of Vanderbilt, 172 N. Y. 69-77; §§ 222, 223, 230, 232 and 241; Morgan v. Cowie, 49 App. Div. 612-616; Matter of Rice, 56 App. Div. 253-256; Matter of Fuller, 62 App. Div. 428-429; Matter of Meyer, 83 App. Div. 381-384; Matter of Abraham, 151 App. Div. 441-442; Matter of Webber, 151 App. Div. 539; Matter of Coogan, 27 Misc. 563-567, affirmed, 162 N. Y. 613; Matter of Eldridge, 29 Misc. 734-738; Matter of Loewi, 75 Misc. 57-62; Matter of Clark, N. Y. Law Journal, February 9, 1912; Matter of Penfold, 142 N. Y. Supp. 678-680.

1896.

MATTER OF GEORGE WILLIAM SUTTON, 149 N. Y. 618,
affirms on opinion below, 3 App. Div. 208.

The estate of the testator consisted of both real and personal property. By the provisions of the will there was an equitable conversion of the real into personal estate, and the whole estate passed to the beneficiaries as personal property, and none of the real estate, as such, was transferred to them.

The appraiser held that the whole estate was to be treated as personal property for the purpose of determining the transfer tax. Upon appeal to the surrogate the order entered upon the appraiser's report was modified so as to exempt from the tax the equity in the real estate over and above the mortgages. From the order of the surrogate the executor and the county treasurer both appealed.

The questions presented on the appeal were, page 210:

"First, Whether the real estate of which the testator died seized is, for the purpose of determining the transfer tax, to be treated as such or as personal property.

"Second, If it is treated as real estate, whether in determining the amount of the tax the debts of the testator secured by mortgages upon the real estate should be deducted from the personal property."

The order of the surrogate was affirmed, the court holding (page 211) the tax should be on the property as the testator "leaves it, without regard to the operation or effect of equitable rules that apply only to the administration of the estate." It also was held that the mortgages should not be deducted from the personal estate.

Transfers of real property situate within the state first taxable to "lineals" by chapter 41, Laws of 1903, in effect March 16, 1903. Vide § 220;

Matter of Dows, 167 N. Y. 227-232; distinguished in Matter of Mills, 86 App. Div. 555, affirmed, without opinion, 177 N. Y. 562.

Matter of Livingston, 1 App. Div. 568; Matter of Offerman, 25 App. Div. 94; Matter of Maresi, 74 App. Div. 76-79; Matter of Daly, 100 App. Div. 373-377, affirmed, without opinion, 182 N. Y. 524; Matter of Wallace, 28 Misc. 603-605; Matter of Baker, 67 Misc. 360-363.

1896.

MATTER OF HENRY BRONSON, 150 N. Y. 1.

The court say, page 3: "The decedent was domiciled in the state of Connecticut, where he died in 1893; leaving, by his will, his residuary estate to his two sons, also residents of that state. A part of the residuary estate consisted in shares of the capital stock and in the bonds of corporations incorporated under the laws of this state and which were in the testator's possession at his domicile. They had been handed over to the residuary legatees, prior to the institution by the comptroller of the City of New York of this proceeding to appraise them for the purposes of taxation under the Transfer Tax Act (chap. 399, Laws of 1892). * * * The important words to be noticed are, in the case of a non-resident decedent 'property within the state.' Their importance is evident; inasmuch as the attempt of the state to collect a tax, where the decedent was not subject to its jurisdiction, is limited to that which possesses the legal attributes and characteristics of property here. * * *

"(Page 5.) Whatever may be argued in support of the right to subject the bonds of domestic corporations to appraisal for taxation purposes under this act, when physically within the state, upon some theory that they are something more than the evidences of a debt and constitute a peculiar and appreciable species of property, within the recognition of the law as well as of the business community, such argument is certainly unavailing in this case; where the bonds themselves were at their owner's foreign domicile. * * *

"(Page 8.) The attitude of a holder of shares of capital stock is quite other than that of a holder of bonds, towards the corporation which issued them. While the bondholders are simply creditors, whose concern with the corporation is limited to the fulfillment of its particular obligation, the shareholders are persons who are interested in the operation of the corporate property and franchises and their shares actually represent undivided interests in the corporate enterprise."

Held, that the transfer of the bonds was not taxable, but that the transfer of the stock was.

Neither bonds nor stock held by a non-resident decedent are taxable if transferred since the amendment by chapter 732, Laws of 1911, in effect July 21, 1911; subdivisions 2 and 4 of § 220, and § 243. Vide opinion of Comptroller, dated May 13, 1913, 2 State Department Reports, 501, opinion quoted, page 119.

As to present law re non-resident estates vide page 133.

Vide *Matter of Embury*, 19 App. Div. 214-217, affirmed, without opinion, 154 N. Y. 746; *Matter of Fitch*, 160 N. Y. 87-90; *Matter of Pullman*, 46 App. Div. 574-577; *Matter of Crerar*, 56 App. Div. 479-482; *Matter of Preston*, 75 App. Div. 250; *Matter of Gibbes*, 84 App. Div. 510-513, affirmed, without opinion, 176 N. Y. 565; *Matter of Schermerhorn*, 50 Misc. 233; *Matter of Bushnell*, 73 App. Div. 325, affirmed, without opinion, 172 N. Y. 649; *Matter of Clinch*, 180 N. Y. 300; *Matter of Daly*, 100 App. Div. 373-380, affirmed, without opinion, in 182 N. Y. 524; *Matter of Cooley*, 186 N. Y. 220-229; *Beers v. Glynn*, 211 U. S. 477-484; sustaining *Matter of Merriam*, 141 N. Y. 479; *Matter of Fearing*, 200 N. Y. 340-344; *Matter of Ames*, 141 N. Y. Supp. 793-795.

1896.

MATTER OF AUGUSTUS WHITING, 150 N. Y. 27.

Testator, a resident of Newport, Rhode Island, died there on the 23d of July, 1894, leaving a will by which he gave his entire estate in trust for his infant daughter. At the time of his death he had money on deposit in a bank in this state, and owned certain bonds and certificates of stock that were found in a box rented by him in a safe deposit vault in this state. The stocks and bonds were issued partly by domestic and partly by foreign corporations; and there were also bonds of the United States.

The court say, page 30: "When the design of the legislature is to tax the transfer of everything that it has power to tax, there is no inconsistency in taxing in one form if another is not available. Indeed, perfect consistency is not always practicable in a scheme of taxation that is intended to let nothing escape that can be owned or transferred. Thus the legislature intended, as I think, to repeal the maxim *mobilia personam sequuntur*, so far as it was an obstacle, and to leave it unchanged, so far as it was an aid, to the imposition of a transfer tax upon all property in any respect subject to the laws of this state. I think this intention plainly appears from the history of legislation upon the subject, the decisions of the courts, some of them in effect repealed, and from the sweeping language of the statute,

which subjects everything that can be owned in this state to a succession tax, except so far as expressly exempted. The legislature possessed and exercised the power to employ the maxim when necessary, and to disregard it when necessary to attain that object. That dominant purpose is the key to the construction of the act, and it should not be thwarted by the conservatism of the courts, even if, in order to embrace all kinds of property, it is necessary to make it so pliable in application as to conform to all methods of doing business and all ways of holding property."

Held, that the stock of the foreign corporations was not taxable, that the stock of the domestic corporations was taxable, that the bonds physically present in this state were taxable, except the United States bonds for (page 31) "although the state may have the power to impose a succession tax upon United States bonds, it has not yet done so."

For present law, vide *supra*, page 133.

Vide *Matter of Bronson*, 150 N. Y. 1; *Matter of Sherman*, 153 N. Y. 1-5; *Matter of Clinch*, 180 N. Y. 300; *Matter of Fearing*, 200 N. Y. 340-345; etiam subdivision 2 of §§ 220 and 243.

United States bonds held to be taxable under amendment of chapter 88, Laws of 1898, in effect March 21, 1898; *Matter of Plummer*, 161 N. Y. 631, sustained sub nom. *Plummer v. Coler*, 178 U. S. 115.

Matter of Tiffany, 143 App. Div. 327-328, affirmed, on opinion of McLaughlin, J., below, 202 N. Y. 550.

Matter of Blackstone, 69 App. Div. 127-129, affirmed, without opinion, 171 N. Y. 682, and sustained in 188 U. S. 189, sub nom. *Blackstone v. Miller*; *Matter of Gibbes*, 84 App. Div. 510-513, affirmed, without opinion, 176 N. Y. 565; *Matter of Coogan*, 27 Misc. 563-565, affirmed, without opinion, 162 N. Y. 613; *Matter of Schermerhorn*, 50 Misc. 233-234; *Matter of Ames*, 141 N. Y. Supp. 793-795.

As to transfer of stock vide § 227 and *Dunham v. City Trust Company of New York*, 115 App. 584-587, affirmed, without opinion, 193 N. Y. 642.

As to leasehold of New York premises held by a non-resident decedent who died prior to 1911 amendment vide *Matter of Rosenbaum*, N. Y. Law Journal, August 7, 1913, opinion quoted, page 730.

1896.

MATTER OF GEORGE MORGAN, 150 N. Y. 35.

The testator died December 17, 1894, a resident of Lakewood, New Jersey. His personal property consisted of stocks and bonds of foreign and domestic corporations, mortgages upon lands in this state, and moneys deposited in banks in this state.

The securities were habitually kept by the decedent in a safe deposit vault in this state, in charge of an agent in this state. There is no other difference between this and the Whiting (150 N. Y. 1) case than that, in the present case, it appears that some of the bonds of the foreign corporation, which were owned by the non-resident decedent, were registered.

Held, the stock of foreign corporations was not taxable, but the bonds, both registered and unregistered, were taxable.

Vide subdivision 2 of § 220 and § 243. For present law vide *supra*, page 133.

Matter of Clinch, 180 N. Y. 300-302; Matter of Gibbes, 84 App. Div. 510-513, affirmed, without opinion, 176 N. Y. 565; Matter of Schermerhorn, 50 Misc. 233-234.

1896.

MATTER OF JOHN F. HOUDAYER, 150 N. Y. 37, writ of error dismissed in 175 U. S. 32, sub nom. Scudder v. Comptroller.

Testator died May 21, 1895, a resident of New Jersey. At his death he had money on deposit in a New York trust company.

The Court of Appeals say, page 40: "If he had deposited *in specie*, to be returned *in specie*, there can be no doubt that the money would be property in this state subject to taxation. But, instead, he did as business men generally do, deposited his money in the usual way, knowing that, not the same, but the equivalent, would be returned to him upon demand. While the relation of debtor and creditor technically existed, practically he had his money in the bank and could come and get it when he wanted it. It was an investment in this state subject to attachment by creditors. If not voluntarily repaid, he could compel payment through the courts of this state. The depositary was a resident corporation, and the receiving and retaining of the money were corporate acts in this state. Its repayment would be a corporate act in this state. Every right springing from the deposit was created by the laws of this state. Every act out of which those rights arose was done in this state. In order to enforce those rights, it was necessary for him to come into this state. Conceding that the deposit was a debt; conceding that it was intangible, still it was property in this state for all practical purposes, and in every reasonable sense within the meaning of the Transfer Tax Act."

The United States Supreme Court say: "No mention of the Constitution of the United States, or of any provision thereof, by the plaintiff in error, or by the court, is to be found at any stage of the case while it was pending in the courts of the state of New York; and it is impossible, upon this record, to avoid the conclusion that it never occurred to the plaintiff in error to raise a Federal question until after the case had been finally decided against him in the highest court of the state.

"In order to give this court jurisdiction of a writ of error to review a judgment which the highest court of a state has rendered in favor of the validity of a statute of or an authority exercised under a state, the validity of the statute or authority must have been 'drawn in question' 'on the ground of their being repugnant to the Constitution, laws or treaties of the United States.' When no such ground has been presented to or considered by the Courts of the State, it cannot be said that those courts have disregarded the Constitution of the United States, and this court has no jurisdiction. Rev. Stat., § 709; *Murdock v. Memphis*, 20 Wall. 590, 633, 634; *Levy v. Superior Court of San Francisco*, 167 U. S. 175; *Miller v. Cornwall Railroad*, 168 U. S. 131; *Columbia Water Power Co. v. Columbia Railway*, 172 U. S. 475, 488, and cases there cited." ¹

Vide subdivision 2 of §§ 220 and 243; *Matter of Blackstone*, 171 N. Y. 682, affirmed in 188 U. S. 189, sub nom. *Blackstone v. Miller*; *Matter of Lord*, 111 App. Div. 152-157, affirmed, without opinion, 186 N. Y. 549, sustained in 211 U. S. 477, sub nom. *Beers v. Glynn*; *Matter of Gordon*, 186 N. Y. 471; *Matter of Gibbes*, 84 App. Div. 510-513, affirmed, without opinion, 176 N. Y. 565; *Matter of Bentley*, 31 Misc. 656-658; *Matter of Probest*, 40 Misc. 431-432; *Matter of Burden*, 47 Misc. 329-330.

¹ *Stickney v. Kelsey*, 209 U. S. 419, dismissing writ of error from *Matter of Stickney*, 185 N. Y. 107; *Tilt v. Kelsey*, 207 U. S. 43, reversing *Matter of Tilt*, 182 N. Y. 557.

1898.

MATTER OF DAVID F. KIMBERLY, 150 N. Y. 90.

Testator died June 29, 1895. The court say, page 93: "The sole question involved relates to the construction of the testator's will, and is whether the bequest was to the testator's sisters jointly, or whether they took the property as tenants in common. That upon the death of one of the legatees before the decease of the testator, the legacy lapsed if it was to the legatees as tenants in common, is not denied by either party. The courts

below have held that the legatees took as tenants in common, and, hence, that as to one-third of the testator's estate, he died intestate.

"The appellant's contention is that the legatees took jointly, and if not, that the bequest was to the sisters of the decedent as a class, and consequently there was no lapse in the disposition by reason of the death of one of the legatees."

The will provided, *inter alia*: "I give, devise and bequeath all my estate, real and personal, of whatsoever kind and where-soever situate, unto my three sisters, Mary, Annie and Louisa." Mary died prior to the death of the testator. The appraiser construed the will and fixed the tax upon the theory that the testator died intestate as to one-third of his estate, by reason of the pre-decease of Mary Kimberly; that Annie and Louisa each took one-third of Mary's share as next of kin, and that the remaining one-third passed to nine nephews and nieces of the decedent as their share of the estate which was undisposed of by the will.

The appraiser's construction was confirmed.

Matter of Eldridge, 29 Misc. 734. The appraiser had to have in this case, it is evident, a knowledge of law in order to perform his duty of appraising the fair market value of the property. The duties of the appraiser are set forth in § 230; *People ex rel. McKnight v. Glynn*, 56 Misc. 35-39.

Vide § 29 of Decedent Estate Law as amended by Laws 1912, Chap. 384, *post*, page 540

1897.

AMHERST COLLEGE v. RITCH, 151 N. Y. 282.

Daniel B. Fayerweather died November 15, 1890, leaving an estate of several millions, and this action involved the construction of his will. A question was raised whether the adjudication by the surrogate in proceedings under the Collateral Inheritance Act was a bar to the present action. The court say, page 342: "This was a special proceeding instituted by the comptroller of the city and county of New York with the sole object of ascertaining what amount of property, passing under Mr. Fayerweather's will, was subject to taxation and to fix the amount of the tax. The decree of the surrogate should be construed solely with reference to that object and, as thus construed, the adjudication was that, for the purposes of taxation under the act in question, a certain amount of property passed to the residuary legatees under the will. Legitimate inquiry

necessarily stopped at that point, for it was immaterial, so far as that statute was concerned, whether the fund became impressed with a trust after it reached the residuary legatees, as the tax would be the same whether it did or not. They took the legal title, as we have held, and hence their legacy was subject to taxation without reference to what it became their duty to do with it. The adjudication was necessarily limited to the subject of taxation, and if conclusive at all as a bar, it was not conclusive upon the rights of the parties arising from matters outside of the will. The surrogate was acting simply as an assessing officer, and represented the state for those purposes. * * *

(Page 343.) "The adjudication of the surrogate was binding upon the question of taxation only."

Vide *Matter of Fayerweather*, 143 N. Y. 114.

As to special proceeding vide § 3334 of Code of Civ. Proc.; *Morgan v. Warner*, 45 App. Div. 424-426, affirmed, on opinion below, 162 N. Y. 612.

1896.

MATTER OF GEORGE KEMP, 151 N. Y. 619, affirms, on opinion below, 7 App. Div. 609.

Testator died a resident November 23, 1893. An inspection of the printed papers on appeal shows that at the time of his death testator was erecting a large building upon real property owned by him. He had contracts with builders and for materials which contracts provided for payments to be made for such building and materials from time to time as the building should be completed. At the time of testator's death there was unpaid upon said contracts the sum of \$251,051.90, said amount not being then due or earned. The surrogate said: "In refusing to deduct from the amount of personal property the sum paid by the executors in carrying out the contract made by the decedent for the erection of buildings upon real property owned by him, the appraiser acted properly." The order of the surrogate was affirmed as to this ruling.¹

The surrogate had appointed in this transfer tax proceeding a special guardian for two infants.² The Appellate Division say: "This case is clearly within the principles laid down in *The Matter of Baudouine* (5 App. Div. 622) and in *The Matter of Livingston* (1 id. 568). Indeed, the principle of the *Livingston* case is more decisive than that enunciated in the *Baudouine*

case. * * * The only error we find in this record is the allowance of twenty-five dollars to the special guardian. We think that the appointment of a special guardian was wholly unnecessary upon the facts in this case, and that the rule laid down in the Post case (Matter of Post, 5 App. Div. 113) on that subject is applicable. The order should, therefore, be modified by striking out the allowance of twenty-five dollars to the special guardian, and as modified, affirmed, without costs."

¹ Matter of Amsinek, N. Y. Law Journal, February 21, 1913, opinion quoted page 657.

² As to special guardian vide § 231 which provides:

"The surrogate shall immediately give notice, upon the determination by him as to the value of any estate which is taxable under this article, and of the tax to which it is liable, to all persons known to be interested therein. * * *

"If, however, it appear at any stage of the proceedings that any of such persons known to be interested in the estate is an infant or an incompetent, the surrogate may, if the interest of such infant or incompetent is presently involved and is adverse to that of any of the other persons interested therein, appoint a special guardian of such infant; but nothing in this provision shall affect the right of an infant over fourteen years of age or of any one on behalf of an infant under fourteen years of age to nominate and apply for the appointment of a special guardian for such infant at any stage of the proceedings."

Vide etiam Matter of Jones, 54 Misc. 202-206.

1897.

MATTER OF SAMUEL WESTURN, 152 N. Y. 93.

Intestate died May 22, 1890. The court say, page 99: "The litigation over the probate of the will of the decedent was finally terminated by the decision of this court, May 21, 1895, in favor of the contestants. It was not until the final determination of the controversy, by the judgment of this court, that it could be known whether the property of the decedent passed under his will or as in case of intestacy, and, until this fact was ascertained, it was impracticable to proceed to fix the transfer tax under the act of 1892, or the prior statutes, since the ascertainment of the persons entitled to the property of a decedent must precede the imposition of any tax. * * *

"(Page 100.) Letters of administration were issued June 3, 1895. The surrogate, on July 6, 1895, on his own motion, appointed an appraiser." The estate contended that the surrogate had no power to appoint an appraiser or to fix the tax

until the fact whether there were claims against the estate had been ascertained in the usual course. The court say, page 101: "When an estate is in the ordinary course of administration, it would seem to be prudent and reasonable for the surrogate to take notice of the statutory system for the settlement of estates, and to defer the appointment of an appraiser for the period necessary to enable the executor or administrator to advertise for claims and ascertain whether there are any creditors."

The court say, page 100: "It is plainly inferable from the sixth section (now § 225) of the act that the debts of the decedent are to be deducted in arriving at the valuation of the property and in fixing the tax. That section authorizes a proportionate amount of a tax to be refunded in case debts against the estate shall be proven after the tax shall have been paid."

The estate also contended that the surrogate erred in refusing to deduct from the valuation of the estate the sum expended by them in the litigation over the will. The court say, page 102: "We think the surrogate properly disallowed this item. It was not a claim existing against the decedent or his property. The tax imposed by the statute is upon the interests transferred by will or under the intestate laws of the state. The devolution of the property and the right of the state have their origin at the same moment of time. The ascertainment of the value of the taxable interest and the fixing of the tax necessarily takes place subsequent to the death. But the guide is the value at the time of the death, when the interests were acquired. The fact that the appellants were put to expense in asserting their rights and were embroiled in expensive litigation to obtain them, was their misfortune. It did not diminish the value of the interests which devolved upon them on Westurn's death. It was a loss, but a loss to their general estate. It did not prevent them receiving the whole interest transmitted to them. The fact that the court charged certain costs and allowances in their favor upon the estate did not change the situation. It was practically a charge upon their own property for the benefit of their attorneys."

A note belonging to decedent was in litigation, and it was held that it was error for the surrogate to include in the appraisement the amount of the note, the court saying, page 103: "It was, we think, the plain duty of the surrogate to have excluded this claim from valuation at the time, reserving it for future appraisement in case the administrators succeeded in collecting it.

"We are also of opinion that the surrogate should have per-

mitted the appellants to have filed the additional allegations in respect to the claim of Mary Clark, that she and her brothers and sisters were the sole heirs and next of kin of Westurn, and to have received and considered the proofs offered to show that a litigation had been commenced in the Surrogate's Court to revoke the letters of administration granted June 3, 1895, based on this claim. It is not suggested that the proceeding was collusive. The application to the surrogate in behalf of the persons contesting the claim of the appellants to be the heirs and next of kin of Westurn, was based upon positive statements under oath. If their claim is well founded it is manifest that the tax could not be assessed against the appellants. They would in the case supposed have no taxable interest. The conflicting claims of the appellants and of Mary Clark and those she represented involved a controversy which affected the title to the whole estate. The surrogate should either have postponed the appraisal until the litigation was determined, or at least should have received and considered the evidence. It is not necessary now to determine, whether as incident to his jurisdiction in tax proceedings under the statute, he could determine which set of claimants was entitled to the estate. It is claimed that the surrogate properly refused to permit the new allegations based on the claim of Mary Clark to be filed, since the sixty days had expired during which an appeal must be taken, and for the further reason that the statute requires the notice of appeal to specify the grounds of appeal, and that there was no reference in the notice served by the appellants to the claim of Mary Clark.

"The appeal to the surrogate, given by sec. 13 of the act of 1892, is in the nature of an application for a rehearing upon which new evidence may be taken, bearing upon the questions involved. The requirement that the notice of appeal shall specify the grounds of appeal, implies that in the prior proceedings, questions had been raised and decided, upon which error could be assigned. But the new fact in the case, viz., the claim of Mary Clark, was not disclosed until after the appeal was taken, and after the expiration of sixty days from September 19, 1895, when the original order of the surrogate fixing the tax was made.

"We think the statute ought to be construed so as to permit the raising upon appeal, of a question which did not enter into the original determination, and which was first made known after the appeal had been taken, and after the expiration of the sixty days. The surrogate had jurisdiction of the appeal by the notice

actually given, and it would be an unwise construction of the act to limit the hearing so as to exclude the consideration of a new question subsequently arising, on the ground that it was not specified in the notice of appeal."

Vide *Matter of Thrall*, 30 App. Div. at page 274, reversed in 157 N. Y. 46, but not as to question of deduction; *Matter of Gihon*, 169 N. Y. 443-445; *Matter of Sanford*, 66 Misc. 395.

Vide §§ 223 and 230. Etiam *Matter of Gihon*, 169 N. Y. 443-445; *Matter of Ramsdill*, 190 N. Y. 492-495; *Matter of Grosvenor*, 124 App. Div. 331-333, affirmed, without opinion, 193 N. Y. 652; *Matter of Brundage*, 31 App. Div. 348; *Matter of O'Donohue*, 44 App. Div. 186; *Matter of Pullman*, 46 App. Div. 574, 577; *Matter of Rice*, 56 App. Div. 253-257; *Matter of Rogers*, 71 App. Div. 461, affirmed, on opinion below, 172 N. Y. 617; *Matter of Maresi*, 74 App. Div. 76-80; *Matter of Dimon*, 82 App. Div. 107-111; *Matter of Skinner*, 106 App. Div. 217-218; *Matter of Kelsey v. Church*, 112 App. Div. 408-409; *Matter of Berry*, 23 Misc. 230-231; *Matter of Purdy*, 24 Misc. 301-303; *Matter of Becker*, 26 Misc. 633-635; *Matter of Kelly*, 29 Misc. 169-170; *Matter of Bentley*, 31 Misc. 656-657; *Matter of Morgan*, 36 Misc. 753; *Matter of Thomas*, 39 Misc. 223-225; *Matter of Marks*, 40 Misc. 507-509.

1897.

MATTER OF GEORGE B. SHERMAN, 153 N. Y. 1.

Testator died in 1896, and the question arose as to whether the act of 1892 exempted United States bonds. In *Wallace v. Myers* (38 Fed. Rep. 184), it was held that the inclusion of United States bonds in the valuation under the laws for the taxation of inheritances, for the purpose of ascertaining the tax, was a valid exercise of the legislative power of a state, and did not constitute a taxation of Federal securities. The case of *Wallace v. Myers* was governed by the act of 1887, chap. 713.

The court say, page 5: "By the first section of that act the tax was imposed upon 'all property' passing by will or by the intestate laws of the state. There was no limitation of this language in the subsequent sections of the act, and it was held, as we think properly, that United States bonds were to be valued in fixing the tax. The act of 1892 contains a new provision, not found in the prior acts. The 22d section declares that the words 'estate' and 'property' as used in the act, 'shall include all property or interest therein, whether situated within or without this state, over which this state has any jurisdiction for the purpose of taxation.'

"We had occasion, in the Matter of Whiting (150 N. Y. 27), to consider the application of this clause of § 22 of the act of 1892 to a case of United States bonds owned by a non-resident decedent on deposit at the time of his death with other securities in the vaults of a safe deposit company in the city of New York. The objection was taken that they could not be included in the valuation under the act of 1892, and this court sustained the objection on the ground that the bonds, being property not subject to the taxing power of the state, were exempt from valuation under the definition of property in § 22. It was probably the primary purpose of this definition to exclude any inference from the generality of the words used in the first section of the act, that the valuation to be made should include the real property of resident decedents situated outside of the state. (See *In re Swift*, 137 N. Y. 77.) But the language extends to all property not within the taxing power of the state, and Federal securities are plainly within the definition. It is the jurisdiction of the state to subject property to taxation under its general taxing power, and not whether the jurisdiction has been exercised, which is the test of exemption under § 22 of the act of 1892. Property of every description passing by will or under the Statutes of Descents or Distributions which is subject to the taxing power of the state, is to be valued under the act, irrespective of the fact whether it has or has not been subjected to taxation under existing laws. (Matter of Knoedler, 140 N. Y. 377.) But we are of opinion that the United States bonds were properly excluded from the valuation of the decedent's estate by the surrogate by force of § 22 of the act of 1892."

Since amendment by chapter 88, Laws of 1898, in effect March 21, 1898, the transfer of United States bonds has been taxable. Matter of Plummer, 161 N. Y. 631, sustained in 178 U. S. 115, *sub nom.* *Plummer v. Coler*. In estates of non-residents it was held that United States bonds were not taxable even though physically within the State at time of decedent's death. Matter of Schermerhorn, 50 Misc. 233, a case in which the decedent died in 1891. Subsequent to 1898 and until the amendment by chapter 732, Laws of 1911, in effect July 21, 1911, the transfer of United States bonds in non-resident estates was taxable if the bonds were physically kept within the State. They have not been taxable in non-resident estates since the 1911 amendment. §§ 220 and 243.

Matter of Delano, 176 N. Y. 486-492, sustained in 205 U. S. 466, *sub nom.* *Chanler v. Kelsey*; Matter of Smith, 150 App. Div. 805-807; Matter of Purdy, 24 Misc. 301-302; Matter Coogan, 27 Misc. 563-565, affirmed in 162 N. Y. 613.

1897.**MATTER OF CATHERINE L. LANGDON, 153 N. Y. 6.**

Catherine L. Langdon died on December 25, 1883, and in her will her residuary estate was devised and bequeathed to her husband, Walter Langdon, to be held, used, enjoyed and disposed of by him at his pleasure so long as he should live and with the right to dispose of the same upon his death by will, or so much thereof as should then remain. It was also provided that such residue, or so much thereof as should remain at his death undisposed of, should then pass to two legatees named or to the survivor.

Walter Langdon, the husband, died on the 16th of September, 1894, leaving a will which was admitted to probate December 4, 1894, and it contained the following provision with respect to the property bequeathed to him for life by the will of his wife with power of disposition by will:

"First. I direct my executors to keep the estate of my deceased wife separate from my estate, and to distribute her estate according to the provisions of her last will and testament, by delivering the same to the executors named in her will for that purpose."

The court say, page 9: "The husband did not in any fair or substantial sense exercise the power of disposition conferred upon him by his wife. The provision of his will above quoted was in fact a relinquishment or renunciation of that right. It was a declaration of his purpose not to exercise the power, but to allow the property to pass under the will of the wife. * * * The property passed directly under the will of the wife, and not through the medium of a power in the husband, and as the will antedated the law, the statute has no application to the case."

Vide subdivision 6, § 220; Matter of Harbeck, 161 N. Y. 211-221; Matter of Pell, 171 N. Y. 48; Matter of Lansing, 182 N. Y. 238; Matter of Ripley, 122 App. Div. 419-423, affirmed, per curiam, 192 N. Y. 536; People *ex rel.* Ripley *v.* Williams, 69 Misc. 402; Matter of Hitchins, 43 Misc. 485-493, affirmed, without opinion, 181 N. Y. 553.

1897.**MATTER OF SARAH H. GREEN, 153 N. Y. 223.**

Testatrix died May 21, 1893. On February 14, 1889, she had delivered certain of her property to a trustee under a trust deed

upon the following conditions and for the following uses. 1. To collect the income and apply the same to her use during her life. 2. After her death, to divide and pay over the same and the proceeds among her three nieces, who were named, the issue of either who might die before the donor to receive the share to which the mother would be entitled if living, and in case of the death of either of the nieces before her without issue her share to go to the survivors.

The court say, page 227: "It is not important to determine whether the trust instrument was made in contemplation of death, or whether, upon the delivery thereof, the remainders vested in the nieces in such a sense as to constitute a gift *inter vivos* within the meaning of the cases cited by the learned counsel for the respondent. It may be conceded that upon the delivery of the trust deed an interest in remainder vested in the nieces subject to open and let in the children of one who had died during the lifetime of the donor, according to the terms of the instrument. The real question is, whether the remainders which the nieces took under the deed, were intended to 'take effect, *in possession or enjoyment*,' at or after the death of the donor. Until her death, they had no actual possession, or right to the possession, of the property. Since they could not receive any part of the principal or the income till after her death, their right of enjoyment was postponed till the happening of that event. Whatever interest they may have had before, the right to the possession and enjoyment depended upon the death of the donor. We think it quite clear that the remainders were transferred to the nieces, in possession or enjoyment, by an instrument intended to take effect for that purpose, at or after the death of the donor, and so the case is brought within the terms of the statute. It matters not whether the transfer is by grant or by gift so long as it was intended to take effect, in possession or enjoyment, at or after the death of the grantor or donor, the devolution of title is subject to the tax.

"The death of the donor was the event which made the transfer complete and effective and secured to the nieces the possession and enjoyment of the property. (*In re Seaman*, 147 N. Y. 77.)

"The property was within this state and the transfer was by a resident. The nieces take the remainders in possession or enjoyment under the laws of this state and under an instrument

made here. It is not important, therefore, whether they now reside here or elsewhere."

Vide *Matter of Cruger*, 54 App. Div. 405-408, affirmed, on opinion below, 166 N. Y. 602; *Matter of Brandreth*, 169 N. Y. 437-442; *Matter of Hess*, 110 App. Div. 476-483, affirmed on opinion of Spring, J., below in 187 N. Y. 554; *Matter of Keeney*, 194 N. Y. 281-285, sustained in 222 U. S. 525, *sub nom. Keeney v. New York*; *Matter of Miller*, 77 App. Div. 473-483; *Matter of Birdsall*, 22 Misc. 180-195, affirmed, without opinion, 43 App. Div. 624; *Matter of Loewi*, 75 Misc. 57-62; *Matter of Spring*, 75 id. 586-587; *Matter of Barbey*, 114 N. Y. Supp. 725; *Matter of Atterbury*, N. Y. Law Journal, March 25, 1913, opinion quoted *sub Trust Deed*, page 871; *Matter of Cowan*, id., July 24, 1913, opinion quoted *sub Gift*, page 699; *Matter of Schermerhorn*, id., June 26, 1913, opinion quoted *sub Trust Deed*, page 869; *Matter of Thorne*, 44 App. Div. 8-10, affirmed, 162 N. Y. 238.

Matter of Paterson, 146 App. Div. 286, affirmed, without opinion, 204 N. Y. 677; *Matter of Webber*, 151 App. Div. 539; *Matter of Heiser*, N. Y. Law Journal, July 19, 1913, opinion quoted *sub Property Held in Trust or Jointly*, page 804.

Matter of Dingman, 66 App. Div. 228.

1897.

MATTER OF THOMAS C. SLOANE, 154 N. Y. 109.

Testator died a resident on June 17, 1890. His will bequeathed \$400,000 to trustees and directed them "to apply the net income thereof to the use of my said wife, by paying the same over to her quarterly during her life or until her remarriage and upon her death or remarriage I give and bequeath out of said principal sum of four hundred thousand dollars the sum of two hundred thousand dollars to the president and fellows of Yale College in New Haven; the sum of one hundred thousand dollars to my sister Euphemia Coffin, wife of Edmund Coffin, and the sum of one hundred thousand dollars to Mrs. Elizabeth W. Barnes, wife of Henry B. Barnes, and said trustees are to pay over and deliver the same accordingly."

The wife of testator married on April 16, 1896, and two days later the transfer tax proceedings were instituted. The appraiser reported his valuation of the property at the sum of \$400,000, less \$6,800 deducted for legal expenses and commissions, leaving the net value of the trust estate \$393,200 and the value of the legacy to Yale College, one-half of that amount, or \$196,600. The surrogate thereupon entered a formal order assessing the taxable interest of Yale College in the estate upon that basis,

which, at the rate of five per cent. on said amount, made the tax \$9,830. The College appealed to the surrogate, who reversed the order and remitted the matter to the appraiser to make a new report, with instructions to compute the value of the estate in remainder by deducting from said sum of \$196,600 the value of the particular estate of the widow for the term during which her widowhood actually existed. *Held*, that the order of the surrogate was correct.

The court discuss the law, saying, page 112: "The original act taxing the right of succession to legacies and inheritances in certain cases has been repeatedly amended in relation to the method of procedure to ascertain the amount of the taxes provided thereby. As it stood, when first enacted in 1885, it required the property passing under a bequest or devise to 'be appraised immediately after the death of the decedent, at what was the fair market value thereof at the time of the death of the decedent, * * * and after deducting therefrom the value of' any 'life estate, or term of years, the tax prescribed by' the act on the remainder was declared to 'be immediately due and payable.' (L. 1885, chap. 483, § 2.) By § 13 provision was made for the appointment of an appraiser by the surrogate, whose duty it was to appraise the property at its fair market value, and the surrogate was then required to 'forthwith assess and fix the then cash value of all estates, annuities and life estates, or term of years growing out of said estate, and the tax to which the same is liable.'

"In 1887, § 2 was amended so as to provide that, 'when any gift, grant, legacy or succession upon which a tax is imposed by section first of this act, shall be an estate, income or interest for a term of years or for life, or determinable upon any future or contingent event, or shall be a remainder, reversion, or other expectancy, real or personal, the entire property or fund by which such estate, income or interest is supported, or of which it is a part, shall be appraised immediately after the death of the decedent, at what was the fair and clear market value thereof at the time of the death of the decedent.' (L. 1887, chap. 713, section 2.) Section 13 was also amended at the same time so as to provide that 'the value of every future or contingent or limited estate, income or interest shall, for the purposes of this act, be determined by the rule, method and standards of mortality and of value which are employed by the superintendent of the insurance department in ascertaining the value of policies of life

insurance and annuities, for the determination of the liabilities of life insurance companies.'

"In 1892 the act was still further amended so as to provide for an appraisal of contingent estates 'immediately after such transfer, or as soon thereafter as may be practicable, at the fair and clear market value thereof at that time, provided, however, that when such estate, income or interest shall be of such a nature that its fair and clear market value cannot be ascertained at such time, it shall be appraised in like manner at the time when such value first became ascertainable.' (L. 1892, chap. 399, section 11.)

"It is claimed by the appellant that the assessment in question is to be made in accordance with the provisions of the Laws of 1885, as amended in 1887. We have held, however, that the method of procedure in a proceeding for the ascertainment and determination of a transfer or inheritance tax is controlled by the statute on the subject in force at the time of the institution of the proceeding, although the tax itself and the rights of the parties are controlled by an earlier statute. (Matter of Davis, 149 N. Y. 539.) In that case the intestate died January 16, 1887, but the proceeding to ascertain the amount of the tax was not commenced until July 24, 1894, and we held that while the rights of the parties depended upon the earlier, the procedure was controlled by the later statute. According to this precedent, therefore, the rights of the parties now before us depend upon the statute as amended in 1887, but the method of procedure depends upon the statute of 1892. * * * After this proceeding was instituted, and on the 27th of May, 1896, the act in relation to taxable transfers of property was incorporated in the General Tax Law after various amendments had been made thereto, one of which provided that 'Whenever an estate for life or for years can be divested by the act or omission of the legatee or devisee it shall be taxed as if there were no possibility of such limitation.' (L. 1896, chap. 908, section 230.) As this act did not take effect until the 15th of June, 1896, it has no application to the proceeding now before us. (Id., section 281.) The trust estate had terminated before the new provision took effect. Moreover, as that provision only relates to the taxation of an estate for life or for years that can be divested by the act or omission of the legatee or devisee, it does not apply to an estate in remainder that cannot be so divested. The estate for life or for years alone is referred to when the statute says, 'it

shall be taxed as if there were no possibility of such a limitation.”

Vide *Matter of Vanderbilt*, 172 N. Y. 69, § 230. *Matter of Mason*, 120 App. Div. 738, affirmed, without opinion, 189 N. Y. 556; *Matter of Meyer*, 83 App. Div. 381-384; *Matter of Lawrence*, 96 App. Div. 29-32; *Matter of White*, 208 N. Y. 64-67; *Matter of Abraham*, 151 App. Div. 441-442; *Matter of Webber*, 151 App. Div. 539; *Matter of Jones*, 54 Misc. 202-205; *Matter of Ames*, 141 N. Y. Supp. 793-796; *Matter of Stuart*, N. Y. Law Journal, May 10, 1913, opinion quoted sub *Power of Appointment*.

1897.

MATTER OF JOHN H. BEACH, 154 N. Y. 242.

Testator died a resident on September 28, 1893, devising and bequeathing to appellant certain of his estate. Appellant claimed that the property given to her by the will was exempt from taxation under that provision in § 2 of the 1892 act which exempts from such taxation real property, and also personal property not exceeding ten thousand dollars in value, passing by will, deed or gift to “any person to whom any such decedent, grantor, donor or vendor, for not less than ten years prior to such transfer, stood in the mutually acknowledged relation of a parent.” Held, that although appellant was an adult when the relationship began she was entitled to the exemption.

In discussing the statute, the court say, page 248: “The legislature, at the time of the enactment in question, had in mind the question of legitimacy, for it excluded illegitimate descendants of a decedent from the benefit of the exemption by the words ‘or to any lineal descendent of such decedent, etc., born in lawful wedlock.’ In other words, illegitimate descendants are not entitled as such to the exemption in any case, or under any circumstances. They only became so entitled under the alternative clause when the conditions of the statute are met, and then not because they are illegitimate, but because they are embraced within the words ‘any person,’ etc. The use of the words ‘mutually acknowledged’ has been regarded as giving force to the view that illegitimate children were alone in the contemplation of the legislature. It is said that a fact may be acknowledged and that the words ‘mutually acknowledged’ do not properly express a relation not existing in fact. We think they were used as equivalent to the words ‘mutually recognized.’ The illegitimate child could not know the fact

of its parentage, and it is difficult to suppose that, by the use of the words 'mutually acknowledged relation,' the legislature intended to denote the actual relation between a parent and his illegitimate offspring, and an open acknowledgment of that relation between themselves and the public for the period mentioned. The clause, we think, was intended to have a broader scope; to include, among others, those cases, not infrequent, where a person without offspring, needing the care and affection of some one willing to assume the position of a child, takes, without formal adoption, a friend or relative into his household, standing to such person *in loco parentis*, or as a parent, and receives in return filial attention and service."

Chapter 88, Laws of 1898, amended the statute by providing that the relationship must begin "at or before the child's fifteenth birthday." Vide subdivision 1 of § 221a of present statute. *Matter of John W. Davis*, 184 N. Y. 299-302; *Matter of Roebuck*, 79 Misc. 589; *Matter of Brundage*, 31 App. Div. 348-351.

1897.

MATTER OF PHILIP EMBURY, 154 N. Y. 746, affirms, without opinion, 19 App. Div. 214.

The court say, page 214: "After the passage of chapter 483 of the Laws of 1885, then known as the Collateral Inheritance Act, it became a matter of legal controversy whether the property of a non-resident decedent, situate within this State, was subject to the tax provided for by such act. It was finally decided by the Court of Appeals, in the year 1889, that it did not affect property within this State which passed by will or intestacy from a non-resident decedent to collateral relatives or strangers. (*Matter of Enston*, 113 N. Y. 174.)

"Intermediate the passage of the statute and the decision in *Matter of Enston*, the Legislature amended such act by chapter 713 of the Laws of 1887, and it was later held, but by a divided court, that one of the objects of the amendment was to tax the personal property within this State owned by a non-resident decedent. (*Matter of Romaine*, 127 N. Y. 80.)

"A few months after the amendment of 1887 took effect, Philip Embury, a resident of New Jersey, died at West Orange in that State. He left a will in which he made disposition of all his estate, and appointed as executors Benjamin T. Kissam and Aymar Embury, both of whom were, at the testator's death, and

ever since have been, citizens and residents of New Jersey. The will was thereafter duly probated in Essex county, New Jersey. Subsequently, and in November, 1888, the executors rendered an account of their trust before the Orphans' Court of Essex county, New Jersey, and were discharged. The will was not proved, nor were ancillary executors or administrators appointed in this State, nor did the executors invoke the laws of the State of New York for any purpose.

"Philip Embury, at the time of his death, was not the owner of any real property in the State of New York, but he was the owner of certain stocks of New York banks, and had moneys on deposit both of a bank and a trust company doing business in the city of New York. The executors withdrew the deposits and took them, together with the bank shares or their proceeds, to New Jersey for disposition in accordance with the provisions of the will, prior to their being discharged as executors. The executors did not pay any tax under the 'Collateral Inheritance Tax Act' of 1887, nor did the Surrogate's Court of New York county have jurisdiction to appoint an appraiser and fix the value of the personal property and the amount of the tax thereon.

"The section of the act of 1887 which attempts to confer jurisdiction on the Surrogate's Court (section 15) reads as follows: 'The Surrogate's Court in the county in which the *real property* is situate of a decedent who was not a resident of the State, or in the county of which the decedent was a resident at the time of his death, shall have jurisdiction to hear and determine all questions in relation to the tax arising under the provisions of this act, and the surrogate first acquiring jurisdiction hereunder shall retain the same to the exclusion of every other.'

"The statute, therefore, only conferred on the surrogate jurisdiction in the case of such non-resident decedents as should die seized of real estate within the surrogate's county. * * *

"(Page 216.) In other words, the statute of 1885, as amended by the act of 1887, declared such of Embury's property as was in New York taxable, but omitted to give the Surrogate's Court jurisdiction to impose the tax."

The jurisdictional defect of the statute re non-resident estates was remedied by chapter 399 of the Laws of 1892; vide § 228 of present act. Etiam *Matter of Fitch*, 160 N. Y. 87-90; *Matter of Pettit*, 171 N. Y. 654; *Matter of Lord*, 111 App. Div. 152-153, affirmed, without opinion, 186 N. Y. 549, and sustained in 211 U. S. 477, *sub nom.* *Beers v. Glynn*; *Matter of Hubbard*, 21 Misc. 566-567.

As to power and duties of surrogate vide opinion of comptroller, dated April 16, 1913, given in answer to inquiry of surrogate of Chemung County, 2 State Department Reports, 497.

As to present law in non-resident estate vide *supra*, page 133.

1898.

MATTER OF JAY GOULD, 156 N. Y. 423, modifies 19 App. Div. 352.

Testator died a resident December 2, 1892. A codicil to the will provided, inter alia: "My beloved son, George J. Gould, having developed a remarkable business ability, and having for twelve years devoted himself entirely to my business, and during the past five years taken entire charge of all my difficult interests, I hereby fix the value of his said services at \$5,000,000."

George J. Gould was allowed to testify, notwithstanding objection by Comptroller based on § 829 of the Code of Civil Procedure. (Vide 19 App. Div. at page 355.)¹

The Appellate Division, page 359, held that expenses of administration "could be arrived at by estimating the same in part."²

The Court of Appeals say, page 426: "The statute reads: 'A tax shall be and is hereby imposed upon the transfer of any property * * * when the transfer is by will.' It will be noted that the imposition of the tax is not limited to property gratuitously given by will, but is extended to all property so transferred. Was not the property mentioned in this codicil transferred by will? Certainly it was, for the title to the bonds and stocks described in the codicil was taken away from the estate of Jay Gould and vested in George J. Gould under and by virtue of the second codicil of the will and such property is, therefore, taxable under the express provisions of this statute. * * *

"(Page 428.) It matters not what the motive of a transfer by will may be, whether to pay a debt, discharge some moral obligation, or to benefit a relative for whom the testator entertains a strong affection, if the devise or bequest be accepted by the beneficiary, the transfer is made by will, and the state by the statute in question makes a tax to impinge upon that performance."

Matter of Rogers, 71 App. Div. 461-465, affirmed, on opinion below, 172 N. Y. 617; Matter of Wolfe, 89 App. Div. 349-351, affirmed, without

opinion, 179 N. Y. 599; Matter of Maverick, 135 App. Div. 44-45, affirmed, without opinion, 198 N. Y. 618; Matter of Huber, 86 App. Div. 458-460; Matter of Niven, 29 Misc. 550-551; Matter of Daniell, 40 Misc. 329-331; Matter of Eaton, 55 Misc. 472-477; Matter of Starbuck, 63 Misc. 156-159, affirmed, 201 N. Y. 531.

¹ Matter of Brundage, 31 App. Div. 348-353; Matter of White, 116 App. Div. 183-185; Matter of Bentley, 31 Misc. 656-657; Matter of Hartman, N. Y. Law Journal, October, 8, 1913, opinion quoted *supra*, page 858. *Contra* Matter of Thompson, 81 Misc. 86, vide *post*, page 857.

² Matter of Granfeld, 79 Misc. 374-376.

1898.

MATTER OF S. MARETTA THRALL, 157 N. Y. 46.

Testatrix left a legacy to the city of Middletown. The Court say, page 49: "In 1896 there was a general revision of all the tax laws of the state, including the Collateral Inheritance Tax, now known as the Transfer Tax. Under the revision there may be no material change in the Transfer Act as to exemptions, but we find a very material change with reference to the general taxation of property. * * * It appears to us that cities are now brought clearly within the provisions of the Transfer Act, and are exempt as to property held or to be held for a public use within the corporate limits."

Deduction will not be allowed for expenses in an action brought by executors, both individually and in their representative capacity, for a construction of the will of their testator, where such action is unnecessary, the questions being such as can readily be settled in the Surrogate's Court by the decree of distribution; and where it also appears that its principal object is to benefit the personal interests of the executors. (Vide 30 App. Div. at page 274.)¹

Prior to the 1896 amendment, vide Matter of Hamilton, 148 N. Y. 310.

After this decision § 244 was added to statute by chapter 382, Laws of 1900, in effect April 11, 1900. Exemptions are no longer granted unless within the terms of § 221 or § 221b. Matter of Crouse, 34 Misc. 670-672; Matter of Huntington, 168 N. Y. 399; Matter of Sanford, 66 Misc. 395.

As to bequest to city in trust for educational purposes vide Matter of Saunders, 77 Misc. 54, affirmed, without opinion, 156 App. Div. 891.

¹As to when allowed vide Matter of Sanford, 66 Misc. 395-399; Matter of Gihon, 169 N. Y. 443-445.

1898.

MATTER OF MARY ANN MURPHY, 157 N. Y. 679, affirms, without opinion, 32 App. Div. 627, which affirms, without opinion, and on authority of Matter of Offerman, 25 App. Div. 94, order of Surrogate of Kings County.

Testatrix died a resident October 23, 1896, and by her will directed her executor to pay a bond and mortgage executed by her. The court held that the amount of the bond and mortgage should not be deducted from the personal estate for the purpose of assessing the estate for taxation under the Transfer Tax Act.

Matter of Livingston, 1 App. Div. 568; Matter of Sutton, 3 App. Div. 208, affirmed, on opinion below, 149 N. Y. 618; Matter of Maresi, 74 App. Div. 76-79; Matter of Berry, 23 Misc. 230.

1898.

MATTER OF HENRY B. GIBSON, 157 N. Y. 680, affirms, without opinion, on ground that case is governed by Matter of Seaman (147 N. Y. 69), 33 App. Div. 628, which affirms, without opinion, order of Surrogate of Ontario County.

Testator died a resident November 20, 1863. By his will he gave to his trustees securities amounting to \$150,000 in trust to pay the income to his daughter for life, with remainders to his children and other grandchildren of testator. The life tenant died October 25, 1897. It was conceded that unless the amendment of chapter 284, Laws 1897 changed the statute the transfer of the remainders upon the death of the life tenant was not taxable under authority of Matter of Seaman, 147 N. Y. 69.

Held, that transfer not taxable. Costs were awarded to each respondent appearing by separate attorney.

Matter of Spaulding, 49 App. Div. 541-549, affirmed, without opinion, 163 N. Y. 607; Matter of Pell, 171 N. Y. 48-53; Matter of Craig, 97 App. Div. 289-294, affirmed, on opinion below, 181 N. Y. 551; Matter of Smith, 150 App. Div. 805.

1899.

MATTER OF SARAH A. LANKFORD PALMER, 158 N. Y. 669, affirms, on opinion below, 33 App. Div. 307.

Testatrix died a resident on April 25, 1896. She bequeathed a portion of her estate "to Bishop William Taylor or his living successor, to be used in his African Mission work." Before the

testatrix died Bishop William Taylor died, and it is conceded that the appellant, Joseph C. Hartzell, is his living successor and is bishop and is entitled to this legacy. He claimed before the surrogate that he was exempt from the tax, because of the fact that he was a bishop.

Held, that although Bishop Hartzell was a resident of New Jersey, the legacy was not taxable.

Vide § 221. As to archbishop vide *Matter of Kelly*, 29 Misc. 169; *Church of the Transfiguration v. Niles*, 86 Hun, 221; *Matter of Frazier*, N. Y. Law Journal, March 28, 1912, opinion quoted sub *Power of Appointment*, page 778.

Matter of McCartin, N. Y. Law Journal, December 5, 1913, opinion quoted *post*, page 608.

1899.

MATTER OF ERASTUS S. EDGERTON, 158 N. Y. 671, affirms, without opinion, 35 App. Div. 125.

Intestate died a resident on April 15, 1893. He had been doing business in the state of Minnesota and some of his property was there and letters of administration upon his estate were there taken out. No administration has been granted in this state. On or about the 31st of March, 1888, he made transfers of the greater portion of his property to his sisters and nephew and nieces, and the controversy in this case is over the question whether such transfers are subject to taxation under the act relating to taxable transfers of property.

There was no power of revocation. He took from the transferees bonds conditioned for the payment to him of certain yearly sums during his life.

The court say, page 128: "By chapter 713 of the Laws of 1887, which was in force when these transfers were made, a tax was imposed upon the transfer of any property 'by deed, grant, sale or gift, made or intended to take effect in possession or enjoyment after the death of the grantor or bargainor.' By chapter 399 of the Laws of 1892, which was in force at the time of the death of Mr. Edgerton, a tax was imposed upon any transfer made 'by deed, grant, bargain, sale or gift made in contemplation of the death of the grantor, vendor or donor, or intended to take effect, in possession or enjoyment, at or after such death.' Under the act of 1887 transfers to a sister were exempt, otherwise under the act of 1892, unless the estate transferred was less than \$10,000.

"It is argued by the appellants that the act of 1892 is applicable, and that the transfers in question were made in contemplation of the death of the transferrer, and, therefore, within the provision of that act above quoted. * * * The transfers here, aside from the trust deed as to the monument, were, I think, intended to take effect in possession and enjoyment at the time they were made and, therefore, were not within the statute. It can hardly be said there was an attempt to evade the law, inasmuch as under the law, as it was at the time the transfers were made, the sisters who received about two-thirds of the property were exempt.

"No particular point seems to be made as to the provision for a monument and care of a burial lot.¹ Assuming that the transfer covered by that instrument would not be deemed to take effect in possession as to the proceeds of the sale of the stock therein mentioned until the death of Mr. Edgerton, still the provision for a monument is considered a part of funeral expenses and so not subject to the tax as ordinarily understood."

Vide subdivision 4 of § 220. *Matter of Spaulding*, 49 App. Div. 541-550, affirmed, without opinion, 163 N. Y. 607; *Matter of Hess*, 110 App. Div. 476-480, affirmed, on opinion of Spring, J., below, in 187 N. Y. 555; *Matter of John Palmer*, 117 App. Div. 360-366; *Matter of Thorne*, 44 App. Div. 8-10, affirmed, 162 N. Y. 238. Vide cases cited sub *Contemplation of Death* and sub *Gift*.

¹ *Matter of Maverick*, 133 App. Div. 44-45, affirmed, without opinion, 198 N. Y. 618.

1899.

MATTER OF JOHN W. MASURY, 159 N. Y. 532, affirms, without opinion, 28 App. Div. 580.

John W. Masury died a resident on May 14, 1895. During the year 1892 he executed deeds of trust in favor of his two adopted sons, the income of which was to go to the beneficiaries. In 1890 he executed a deed of trust which provided that the income should go to himself or order, and in 1892 he directed the trustee to pay the income to his grandson "until this authority is revoked by me in writing."

There was no question of fraud involved; he acted in good faith and with the single purpose of providing for his adopted sons, in executing and delivering the several trust deeds. The only point at issue was whether these deeds of trust were gifts among the living, or whether they were in some manner con-

tingent upon the death of the grantor. It is conceded that if the deeds of trust were gifts taking full effect during the lifetime of the parties, the property would be beyond the reach of the statute; but a clause having been inserted in each of such deeds of trust, reserving the right of the grantor "to revoke and annul the same during my lifetime," it is urged that the gifts did not become absolute and completed until the death of the grantor, and that the property is, therefore, properly included in the appraisal. The court say, page 583: "It is necessary, to bring this property within the scope of the law, that the gift should have been made 'in contemplation of the death of the grantor,' or that it was 'intended to take effect, in possession or enjoyment, at or after such death.' * * *

We are asked to determine that, because of the fact that the grantor might have revoked the trusts at any time during his lifetime, the rights of the appellants in the trust funds did not become absolute until after the death of the grantor, and that, therefore, the property passed into the possession of the appellants, or their rights became absolute, upon the death of the grantor, and it is subject to the tax which was ordered by the surrogate to be collected. This does not, however, follow. If it should be determined that the gift did not become absolute until the possibility of its annulment ceased, upon the death of the grantor, it would still be necessary to show that the gift was 'intended to take effect, in possession or enjoyment, at or after such death;' and to determine the intention of the donor, we must look, not to the argument of the respondent, but to the language of the deeds of trust, the relations which existed between the parties, and the fact of the beneficial enjoyment of the avails of the trust." After quoting from the 1892 trust deeds the court continue, page 585: "We must conclude that the title to the property passed to the trustee, and that it constituted no part of the property of the said John W. Masury at the time of his death, and should not have been included in an appraisal of his estate for the purpose of taxation under the Transfer Tax Act."

The 1890 trust was held to be taxable.

Vide subdivision 4 of § 220; Matter of Bostwick, 160 N. Y. 489; Matter of Keeney, 194 N. Y. 281, sustained *sub nom.* Keeney v. New York, 222 U. S. 525; Matter of Patterson, 146 App. Div. 286-291, affirmed, without opinion, 204 N. Y. 677; Matter of Spaulding, 49 App. Div. 541-550, affirmed, without opinion, 163 N. Y. 607; Matter of Smith Ely, N. Y.

Law Journal, March 6, 1912, opinion quoted, *post*, page 868; Matter of McKeon, id., June 8, 1912, opinion quoted, *post*, page 647; Matter of Schermerhorn, id., June 26, 1913, opinion quoted, *post*, page 869; Matter of Cowan, id., July 24, 1913, opinion quoted from, *post*, page 699, and cases sub Trust Deed and sub Gift.

1899.

MATTER OF MARY A. EDSON, 159 N. Y. 568, affirms, on opinion below, 38 App. Div. 19, which reversed 24 Misc. 356.

Testatrix died a resident May 29, 1890. Dispute arose as to the construction of the will; the state was not made a party to the action. The will was construed by the court to give an absolute legacy to John E. Parsons, one of the executors, but, from facts appearing extrinsic thereto it was held that the legacy was impressed with a trust in favor of the next of kin.

The court held (page 21) that the question of whether the legacy was taxable was "not affected by the form of the Supreme Court judgment" in the action brought to construe the will, "the state not being a party to that action, and the judgment having been entered by consent without its having appeared or been heard."

The court further say, page 22: "The question is, therefore, whether Mr. Parsons or the brother of the testatrix took the one-third interest which it is here sought to tax under the will. If Mr. Parsons, then, under the Collateral Inheritance Tax Law (chap. 713, Laws of 1887), such interest is subject to the tax. Disregarding the form of the final judgment in the Supreme Court as not binding upon the State, we find that, under the decision of the Court of Appeals, the one-third of the residuary estate passed under the will and vested in Mr. Parsons absolutely, and that no trust was imposed thereon by the will, and although it was held that, as the result of the extrinsic evidence introduced, he took it impressed with a trust in favor of the brother, this would not relieve him from the payment of the tax."

Matter of Willets, 119 App. Div. 119-126, affirmed, without opinion, 190 N. Y. 527; Matter of Lawrence, N. Y. Law Journal, February 15, 1913, opinion quoted in footnote to Matter of Tilt, *post*, page 317.

1899.

MATTER OF EMILY M. FITCH, 160 N. Y. 87.

Testatrix died a resident of Connecticut July, 1894. The court say, page 89: "The question presented is not whether the property is taxable under the Taxable Transfer Act, under which the surrogate has, in proceedings taken for that purpose, made an order imposing a tax, but whether the Surrogate's Court had jurisdiction to make the order."

The will was admitted to probate in Connecticut and the estate administered there, the executor paying to the state of Connecticut the sum of \$4,451.79, that being the amount of collateral inheritance tax imposed by the laws of that state. In April, 1897, nearly three years after death of testatrix, the comptroller instituted a proceeding in the Surrogate's Court of New York county for the appointment of an appraiser to fix and determine for the purposes of taxation, under the Taxable Transfer Act of the state of New York, the value of the personal property of the said Emily M. Fitch which was situated in the state of New York at the time of her death, and which the petitioner asserted was either passed or transferred by the terms of the will. The property consisted of 348 shares of the capital stock of the Consolidated Gas Company of New York, a corporation having its principal office in New York county. The certificates representing the stock were in her possession in Connecticut at the time of her death, and they passed into the possession of her executor, who was also a resident of Connecticut.¹

The court say, page 91: "Unless authority is conferred upon the surrogate to impose the tax, an order to that effect is without jurisdiction and void. * * * So much of the statute as is material in a discussion of the question reads as follows: 'The Surrogate's Court of every county of the state having jurisdiction to grant letters testamentary or of administration upon the estate of a decedent whose property is chargeable with any tax under this act, or to appoint a trustee of such estate or any part thereof, or to give ancillary letters thereon, shall have jurisdiction to hear and determine all questions arising under the provisions of this act, and to do any act in relation thereto authorized by law to be done by a surrogate in other matters or proceedings coming within his jurisdiction.' (Laws 1892, chapter 399, § 10.)

"Neither letters testamentary nor ancillary letters were ap-

plied for or issued in this case, but that fact has no bearing whatever on the question involved, for the jurisdiction of the court is to be determined by the answer to the question: Had the court power to issue letters?"

Held, that as the surrogate had power to issue letters under subdivision 3 of § 2476 of the Code of Civil Procedure, he had jurisdiction in the tax proceedings and his order was affirmed.

Vide § 228 and subdivisions 2 and 4 of § 220, and § 243. *Beers v. Glynn*, 211 U. S. 477-484, sustaining *Matter of Lord*, 186 N. Y. 549; opinion of state comptroller, dated April 16, 1913, 2 State Department Reports, 497-499. *Matter of Hubbard*, 21 Misc. 566.

As to transfers since 1911 in estates of non-residents vide *supra*, page 133.

¹ *Matter of Bushnell*, 73 App. Div. 325-327, affirmed, without opinion, 172 N. Y. 649.

1899.

MATTER OF JABEZ A. BOSTWICK, 160 N. Y. 489.

The surrogate imposed a transfer tax upon property received under certain deeds executed and delivered to the New York Life Insurance and Trust Company by Jabez A. Bostwick, deceased. Bostwick died in August, 1892, and at the time of his death was a resident of the city of New York. The statute imposing a tax, in force at the time of his death (chapter 399, Laws of 1892, § 1, the Transfer Tax Act), provided, among other things, that a tax should be imposed upon the transfer of any property, real or personal, of the value of \$500 or over, or of any interest therein or income therefrom, in trust or otherwise, when the transfer was made by "deed, grant, bargain, sale or gift made in contemplation of the death of the grantor, vendor or donor, or intended to take effect in possession or enjoyment at or after such death." The instruments, six in number, were executed and delivered to the trust company at different times between August 19, 1889, and February 3, 1892, and provided that Bostwick could, at any time prior to his death, withdraw from the possession of the trustee any or all of the property transferred, and substitute other property in its place. They also provided that he could alter, amend or terminate the trust in whole or in part, and in case of a termination all the property should be returned to him. A further provision was inserted in some of them to the effect that the income from the property, or the greater portion of it, should during Bostwick's life, if he so

desired, be paid by the trustee to him, or to such other persons as he might direct.

The order of the surrogate was affirmed, the court saying, page 493: "The act of 1892 (chap. 399, sec. 1, subd. 3), whose provisions must control, provided for the imposition of the tax upon the transfer of property, when it was made in contemplation of death, 'or intended to take effect in possession or enjoyment at or after such death.' We must discover the intention of Mr. Bostwick by considering the language of the instruments, through which he transferred his properties to the trustee. Instead of an out and out gift, which would provide for the enjoyment by the beneficiary of the income of the property during her life and for the disposition of the trust fund thereafter, we find powers reserved to alter, or amend, the trust by notice to the trustee; to withdraw, or to exchange, any securities, and to control the acts of the trustee in selling, or disposing of, the securities, or with respect to investments. All these are indicia, rather, of an intention on the donor's part to retain a dominion over the properties transferred, and do not consist with an existing purpose to vest the absolute right to present and future enjoyment in the beneficiaries. He retained practical control of the trust property and left the question of its beneficial enjoyment and eventual possession open until his death.

"The affirmance of the decision in the Masury case (159 N. Y. 532) may seem to have committed this court to views which support the contention now made in behalf of these appellants; but, if that be so, it an erroneous inference from that decision.

"I think that we may have gone too far in generally affirming the Masury decision; certainly the limit was then reached, beyond which the courts could not go without emasculating the provisions of the statute. We thought there was some reason in the facts of the Masury case for finding an intention in the donor to make an absolute transfer of property during his life, which the mere reservation of a power to revoke was of itself, insufficient to negative. But, if the trust transfers now in question were held to be without the operation of the act, too dangerous a latitude of action would be permitted to persons who desired to evade its provisions by some technical transfer, which would still leave the substantial rights of ownership in the donor."

Vide subdivision 4 of § 220. Matter of Spaulding, 49 App. Div. 541-550, affirmed, without opinion, 163 N. Y. 607; Matter of Miller, 77 App. Div. 473-483; Matter of Smith Ely, N. Y. Law Journal, March 6, 1912; Matter

of Barbey, 114 N. Y. Supp. 725; Matter of Keeney, 194 N. Y. 281, sustained in 222 U. S. 525, *sub nom.* Keeney v. New York, Matter of Schermerhorn, N. Y. Law Journal, June 26, 1913, opinion quoted sub Trust Deed, page 869.

1900.

MATTER OF JOHN H. HARBECK, 161 N. Y. 211.

John H. Harbeck died February 2, 1878, leaving a last Will and Testament by which he gave to his wife, Eliza D. Harbeck, a life interest in \$300,000, the will providing that upon her death the said money was to be paid over to such person or persons as the said Eliza D. Harbeck shall in and by her last Will and Testament give and bequeath the same, and in default of such last Will and Testament, then to pay and deliver over the same to such person or persons, and in the same proportions, as by the present laws of the state of New York would take and inherit real estate from the said Eliza D. Harbeck, in case of her dying intestate seized and possessed thereof.

The said Eliza D. Harbeck died January 15, 1896, leaving a last Will and Testament by which she exercised the power of appointment

The court say, page 217: "The decision of this Court in Matter of Miller (110 N. Y. 216) is authority for the proposition that the act of 1897 (chapter 284) is entitled to consideration at the hands of the court, as a legislative declaration that the subject-matter of the new provisions did not prior thereto constitute a part of the law." ¹

Held, that where there is a question of doubt, the doubt should be reserved in favor of the taxpayer, and against the taxing power; and that while the power of appointment did not take effect until after the death of Mrs. Harbeck in 1896, it was not the authority by which the beneficiaries acquired the fund. The source of their title to the fund was the original will of John H. Harbeck, which went into effect in 1878, and into that instrument must be read the names of the appointees although designated by a later instrument. For those who take under the power of appointment, take as if their names were in the grant of the power. The court accordingly held that the transfers were not taxable.

A year after the question in this case arose, the Legislature amended the statute by chapter 284, Laws of 1897, in effect April 16, 1897, now sub-

division 6, § 220. This amendment was held to be constitutional in *Matter of Vanderbilt*, 163 N. Y. 597. Vide *Matter of Cooksey*, 182 N. Y. 92; *Matter of Mergentime*, 129 App. Div. 367-374, affirmed, on opinion below, 195 N. Y. 572; *Matter of Fearing*, 138 App. Div. 881-882, affirmed, with opinion, 200 N. Y. 340; *Matter of Burgess*, 204 N. Y. 265-268; *Matter of Walworth*, 66 App. Div. 171-174; *Matter of Smith*, 150 App. Div. 805-808; *Matter of Kissel*, 65 Misc. 443-444, affirmed, without opinion, 142 App. Div. 934. Etiam *Matter of Lansing*, 182 N. Y. 238; *Matter of Ripley*, 192 N. Y. 536; *People ex rel. Ripley*, 69 Misc. 402; *Matter of Haight*, 152 App. Div. 228.

¹ *Matter of Enston*, 113 N. Y. 174-183; *Matter of Buckingham*, 106 App. Div. 13-19.

1900.

MATTER OF JOSEPH PLUMMER, 161 N. Y. 631, affirms, without opinion, 47 App. Div. 625, which affirms, without opinion, 30 Misc. 19; sustained in 178 U. S. 115, sub nom. *Plummer v. Coler*.

Decedent died a resident October 24, 1898. Sole question at issue is whether or not a transfer of United States bonds which took place since March 21, 1898, the date when chapter 88 of the laws of that year took effect, is taxable thereunder. Surrogate Varnum said, page 20: "By the act of 1898 (chap. 88) the words which the Court of Appeals, in *Matter of Whiting*, 150 N. Y. 27, and *Matter of Sherman*, 153 N. Y. 1, construed as indicating an intention of the Legislature not to tax bonds of the United States, were omitted from the section in question. Tax Law of 1896, section 242; Laws of 1892, chap. 399, section 22. It is but reasonable to suppose that in making this omission, the Legislature had in mind the decisions prior to 1892, and the judicial construction given to those words 'over which this State has any jurisdiction for purposes of taxation,' in *Whiting* and *Sherman* cases, and intended by the act of 1898 to reach 'all property,' including bonds of the kind in question, as was possible before 1892.

"It is almost unnecessary to state that the theory on which the courts have held this kind of security taxable is that the tax is not upon the bonds themselves but upon the transfer thereof. This distinction is firmly established in this State."

The transfer was held taxable.

Keeney v. New York, 222 U. S. 525-533, sustaining *Matter of Keeney*, 194 N. Y. 281. Vide footnote, *supra*, to *Matter of Sherman*, 153 N. Y. 1.

1900.

MATTER OF JOSEPH THORNE, 162 N. Y. 238, dismissed appeal from 44 App. Div. 8, which reversed 27 Misc. 624.

The court say, page 239: "The order of the Appellate Division reversed the decree of the surrogate 'upon the facts and the law.' Under the Constitution the jurisdiction of this court is limited to a review of questions of law only. It, therefore, has no power to review the determination of the Appellate Division in reversing upon the facts. An examination of the record clearly shows that a question of fact was involved.

"Eunice E. Huff, the respondent, claimed that Thorne gave her one thousand shares of the American Press Association stock of the value of one hundred thousand dollars (\$100,000) before his death. In her testimony she makes several contradictory statements with reference to the transaction. The appraiser found that the transfer was made to her charged with a trust on her part to be performed of taking care of Thorne during his life, and that the remainder was intended to vest in her and take effect at and after his death.

"The surrogate, in confirming the report of the appraiser, says: 'The testimony of Mrs. Huff is contradictory. The appraiser has adopted that version of her story which is most favorable to the state. In this I think he has adopted the correct rule. The witness is adverse. The result of her testimony means a difference of five thousand dollars (\$5,000) to her. We must, therefore, assume that she would put that construction upon the transaction which would be most favorable to her, and most likely to relieve her of a tax.'

"The Appellate Division reached a different conclusion. It adopted her claim that the gift was absolute and took effect at the time that it was made, and that the title to the stock vested in Mrs. Huff from that time.

"It is, therefore, apparent that a question of fact was involved which this court has no jurisdiction to review."¹

Vide *Matter of Brandreth*, 169 N. Y. 437; *Matter of Hess*, 110 App. Div. 476-480-483, affirmed, on opinion of Spring, J., below, in 187 N. Y. 554; *Matter of Miller*, 77 App. Div. 743-480; *Matter of Stebbins*, 52 Misc. 438-441; *Matter of McKeon*, N. Y. Law Journal, June 8, 1912, opinion quoted sub *Contemplation of Death*, page 647.

¹ *Matter of Thayer*, 193 N. Y. 430-433.

1900.

WILLIAM J. MORGAN, COMPTROLLER, v. GEORGE B. WARNER ET AL., AS EXECUTORS, ETC., OF JOHN STOLP, DECEASED, 162 N. Y. 612, affirms, on opinion below, 45 App. Div. 424.

Testator died a resident February 10, 1899. The appeal of the comptroller was met with the objection that it was unauthorized.

The court say, page 425: "By section 232 of chapter 908 of the Laws of 1896 (The Tax Law) the procedure under such assessment is prescribed. Pursuant to that section the determination was first made upon the report of the appraiser, and, upon an appeal from said determination by the executors and the legatees, the determination was in part reversed. The statute then provides: 'Within two years after the entry of an order or decree of a surrogate determining the value of an estate and assessing the tax thereon, the Comptroller of the State may, if he believes that such appraisal, assessment or determination has been fraudulently, collusively or erroneously made, make application to a justice of the Supreme Court of the judicial district in which the former owner of such estate resided for a reappraisal thereof. The justice to whom such application is made may thereupon appoint a competent person to reappraise such estate.'"¹

The estate claimed that the Legislature has prescribed a specific mode of review of the determination of the surrogate upon the appeal; that that provision was intended to be exclusive, and that no right of appeal from that determination is given by the statute. The court say, page 426: "But this appeal need not necessarily rest upon that single statute. If other statutes exist which are applicable thereto they must be read in connection with the statutes, they together prescribing the mode of determination of this tax and also the mode of review. By section 2570 of the Code of Civil Procedure, it is provided: 'An appeal to the appellate division of the Supreme Court may be taken from a decree of the Surrogate's Court or from an order affecting a substantial right made by a surrogate or by a surrogate's court in a special proceeding.' This proceeding would seem to come within the purview of that section, and the order made by the surrogate from which this appeal is taken, involving, as it does, a substantial right, may be reviewed under

this section by the Appellate Division. The comptroller then, if he desires further evidence or future examination of the assets of an estate may proceed under the Transfer Tax Statute and have a reappraisement under an order of a Justice of the Supreme Court. If, however, he desires simply a review of the determination made by the surrogate thereupon, he may have that review upon an appeal."

The testator held notes against four of his grand-nephews and grand-nieces, and by his will he directed that the notes be cancelled. The appraiser fixed the value at par, and the surrogate, on appeal, held that the notes were valueless. The court say, page 427: "We think the order of the surrogate was right. It is first challenged upon the ground that the finding of the surrogate that the notes were valueless was without evidence. We are satisfied that the testimony of the executor as to the declarations of the testator is incompetent evidence of the value of the notes, and it is not proof upon which a finding of the surrogate can be made or sustained. At folios 64 and 65 of the record, however, the executor swears without qualification that these notes were valueless. This evidence was given without objection. The executor was not cross-examined thereupon. While the witness has stated a conclusion of fact, which under proper objection would have been excluded as improper in form, nevertheless no objection was made. The presumption is made that, if the objection had been made, the form of the question would have been corrected to ask for the facts from which this conclusion was drawn. The Comptroller cannot now be heard to say that the fact as to the value of the notes was found without sufficient evidence."²

"The appellant further contends that, notwithstanding the insolvency of the makers, inasmuch as the notes are given as legacies to the makers themselves, they should be assessed at their face value. It will hardly be claimed that if these notes were given by the will to legatees other than the makers they should not be appraised at their market value. Upon this the statute is clear. In chapter 908 of the Laws of 1896, under which this tax is assessed, this rule of appraisal is unmistakably stated. In § 230 provision is made for the appointment of 'a competent person as appraiser to fix the *fair market value*' of property subject to this tax. In § 231 the appraiser 'shall at such time and place appraise the same at its *fair market value* as herein prescribed.' In § 232, 'The surrogate shall forthwith,

as of course, determine the cash value of all estates.' In § 222 of the act, 'Every such tax shall be and remain a lien upon the property transferred until paid, and the person to whom the property is so transferred *and the * * * executors * * ** of every estate so transferred, shall be personally liable for such tax until its payment.' In § 224, the executor is forbidden to deliver the legacy until the payment of the tax, and he has power to sell the property to collect the tax thereon.

"The statute, it will be seen, thus plainly provides for the appraisal of all property at its fair market value. No exception is made in cases where promissory notes are given to their makers, and the court is not authorized to read into the statute any such exception."³

Vide §§ 224, 230 and 231; *Matter of Hull*, 109 App. Div. 248-250.

¹ *Matter of Elizabeth H. Smith*, 40 App. Div. 480.

² *Matter of Yerkes*, N. Y. Law Journal, December 5, 1912, opinion quoted sub Testimony.

³ *Matter of Manning*, 169 N. Y. 449; *Matter of Wood*, 40 Misc. 155.

1900.

MATTER OF APPLICATION OF MICHAEL COOGAN FOR A WRIT OF MANDAMUS, 162 N. Y. 613, affirms, without opinion, 45 App. Div. 628, which affirms, without opinion, 27 Misc. 563.

The petitioner sought by this proceeding to compel the refunding of a tax which he claimed was erroneously paid on the transfer to him of certain registered bonds of the United States, under the will of Jesse B. Casterline, who died November 14, 1894. By an order of the Surrogate's Court a tax was assessed upon this legacy including these bonds, under the law relating to taxable transfers of property. The amount of this tax upon the bonds was paid by the executors of the will to the county treasurer of Livingston county, May 13, 1895, and was in turn charged against the legacy of this petitioner, and deducted therefrom as appears by the final account of the executors, which was judicially passed and settled by said Surrogate's Court in 1895. On January 9, 1899, upon the application of this petitioner, the same Surrogate's Court, after notice to the comptroller of the State, made an order that so much of the order dated the 6th day of May, 1895, as fixed and decreed a tax upon the transfer of said registered bonds of the United States be vacated, set aside and in all things held for naught. A demand was then made

upon the comptroller to direct the county treasurer of Livingston county to refund to the petitioner the amount of such tax, pursuant to § 225 of the Tax Law. The comptroller having refused to comply with that demand the petitioner now seeks to compel him so to do under the section last referred to.

Under the statute in force at death of decedent United States bonds were not taxable. The court say, page 565: "The surrogate had no jurisdiction to assess a tax on the transfer of these bonds and the tax was not merely an erroneous one, but illegal for want of any jurisdiction to impose it. The comptroller, however, questions the power of the surrogate to modify or vacate the order assessing the tax on the transfer of these bonds after the time to appeal therefrom has expired.

"Under the Code of Civil Procedure, section 2481, subdivision 6, the surrogate has power to open, vacate, modify or set aside a decree or order of his court 'in a like case, and in the same manner as a court of record and of general jurisdiction exercises the same powers.' This may be done upon the application of any one for sufficient reason in furtherance of justice. Matter of Flynn, 136 N. Y. 287; Ladd v. Stevenson, 112 N. Y. 325. The case presented to the surrogate was not one where the order or decree was sought to be modified or vacated because of an irregularity, but because it was void as having been made without jurisdiction."

As to statute of limitations re refund vide Matter of Hoople, 179 N. Y. 308 and § 225. Matter of Plummer, 161 N. Y. 631, sustained *sub nom.* Plummer v. Coler, 178 U. S. 115, as to United States bonds.

As to power of Surrogate to vacate decree vide Matter of Scrimgeour, 175 N. Y. 507; Matter of Willets, 119 App. Div. 119-124, affirmed, without opinion, 190 N. Y. 527; Matter of Niven, 29 Misc. 550; Morgan v. Cowie, 49 App. Div. 612-615; Matter of Wallace, 28 Misc. 603-606; Matter of von Post, 35 Misc. 367; Matter of Buckingham, 106 App. Div. 13-17; Matter of Jones, 54 Misc. 202-205; Matter of Weiler, 122 N. Y. Supp. 608, affirmed, without opinion, 139 App. Div. 905; Matter of Townsend, 153 App. Div. 85; Matter of Scott, 208 N. Y. 602.

1901.

MATTER OF WILLIAM H. VANDERBILT, 163 N. Y. 597,
affirms, on opinion below, 50 App. Div. 246. Same case
in 166 N. Y. 640.

The testator died December 8, 1885. The court say, page 247: "The single question arising on this appeal may be stated as follows: Is the right of succession to the trust fund created by the

will of William H. Vanderbilt and as to which a power of appointment was given to the testator's son Cornelius Vanderbilt, subject to the imposition of a transfer tax under the provisions of chapter 284 of the Laws of 1897? The question arises upon the following facts:

"William H. Vanderbilt died in 1885, and his will was admitted to probate in the month of December of that year. The trust fund involved in this proceeding was established in favor of his son Cornelius, who was to enjoy the income for life. The testator directed that upon the death of Cornelius the fund should be paid to his lawful issue in such shares or proportions as Cornelius might by his last will have directed or appointed, and in default of such appointment, the gift is made directly to the issue with an alternative disposition on failure of such issue.

"Cornelius Vanderbilt died in 1899, leaving a last will and testament, which was duly admitted to probate, and in and by which he exercised the power given by the will of his father by appointing a certain specified portion of the fund to one of his sons and directing that the balance be equally divided among his other children. At the time of the death of William H. Vanderbilt, this fund, or the right of succession to it, was not taxable under the Collateral Inheritance Tax Law.¹ The trustees of the fund held and administered it until the death of Cornelius Vanderbilt.

"In 1897 an amendment of subdivision 5 of section 220 of the Tax Law was passed, which provides that whenever any person shall exercise a power of appointment derived from any disposition of property made either before or after the passage of the amendment, such appointment when made shall be deemed a transfer, taxable under the provisions of the act, in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will.

"In December, 1899, a trustee of the fund under the will of William H. Vanderbilt, presented a petition to the surrogate setting forth the creation of the trust fund (with other trusts of a similar character for the benefit of other persons), and that through proceedings taken in 1887 to assess and determine the tax upon legacies made under the will of William H. Vanderbilt, it was in effect determined that the fund herein referred to was not subject to any transfer or inheritance tax. The petition sets forth the exercise of the power of appointment by Cornelius

Vanderbilt and the names of his children, and that the comptroller claims that the fund or some portion of it may be subject to the payment of a tax by reason of the provisions of chapter 284 of the Laws of 1897, and he prays that it be adjudged by the surrogate that neither said fund nor any part thereof is liable to any such tax by reason of any of the said provisions or otherwise. This petition is in the nature of an application to the surrogate to determine the subject of taxation as applicable to this trust fund, and the matter was submitted in that aspect upon a stipulation as to agreed facts. * * *

“(Page 248.) The provision of the amendment of 1897 covers directly and in terms the present case. The fund, or the right of succession to the fund, has never, as matter of fact, been taxed, and we think the power to impose a tax was not exhausted by the proceedings in the Surrogate’s Court for the imposition of a tax directly connected with the general estate of William H. Vanderbilt. The real ground upon which the contention of the appellant is made here, is that the execution by Cornelius Vanderbilt of the power of appointment related back to the will of his father, which gave him that power, and that, therefore, everything connected with and every interest affected by the exercise of that power is to be regarded as coming under the administration of William H. Vanderbilt’s estate and must be controlled by the law in operation at the time of the probate of William H. Vanderbilt’s will. * * *

“(Page 249.) Scrutinizing the text of the amendment of 1897 it appears that the direct object of that legislation was to make the time at which the appointee would become entitled in possession the time at which the tax upon the right of succession should be imposed. Furthermore, the act constituting the transfer is declared to be the exercise of the power of appointment. It is argued by the learned counsel for the appellant that this legislation is ineffective because it impairs contract obligations, interferes with vested rights of the children of Cornelius Vanderbilt and deprives them (to the extent of the tax) of property without due process of law. * * *

“(Page 250.) The argument seems to be that when the Collateral Inheritance Tax Law of 1885 was passed it constituted a contract between the State of New York and William H. Vanderbilt that his estate, provided he should die while that law was in full operation and unchanged, might be disposed of by him without the imposition of any further or other tax upon any

rights or interests acquired under that will. We cannot assent to that proposition. * * *

“(Page 251.) When he died, the law as it then existed made no provision for the taxation to the ultimate right of succession to the fund. The legal title to it upon the probate of his will was in his executors until they accounted in the Surrogate’s Court, constituted the fund out of the assets of the estate, and transferred it from themselves as executors to themselves as trustees, which we assume in this case was done. They held the fund still under the will but undistributed and finally undistributable until the power of appointment was exercised by Cornelius Vanderbilt. Meantime, and while they held it so undistributed in fact, the State, in the exercise of its general power of taxation, found it expedient to tax the right to the succession, which right had not theretofore been taxed, making the transfer consist in that act by which each of the appointees became entitled to claim and to receive the particular or specific distributive share allotted to him. * * *

“(Page 252.) While the appointees take by relation back so as to derive their title under William H. Vanderbilt’s will, they must take their specific shares in designated amounts from the time of the execution of the power, and we think that the authority of the State to impose a tax on the right of succession continued until the time at which the extent of that right was finally fixed by the exercise of the power of appointment.”

Vide subdivision 6 of § 220. *Matter of Potter*, 51 App. Div. 212; *Matter of Rogers*, 71 App. Div. 461, affirmed, on opinion below, 172 N. Y. 617; *Matter of Delano*, 176 N. Y. 486–492, sustained in 205 U. S. 466, *sub nom. Chanler v. Kelsey*; *Matter of Buckingham*, 106 App. Div. 13–18; *Matter of Smith*, 150 App. Div. 805–809; *Matter of Warren*, 62 Misc. 444–447; *Matter of Stuart*, N. Y. Law Journal, May 10, 1913, opinion quoted sub *Power of Appointment*.

Matter of Howe, 86 App. Div. 286, affirmed, without opinion, 176 N. Y. 570; *Matter of Burgess*, 204 N. Y. 265; *Matter of Haight*, 152 App. Div. 228; *Matter of Ripley*, 192 N. Y. 536; *People ex rel. Ripley v. Williams*, 69 Misc. 402.

¹ Transfers to persons of 1% class of personal property were first made taxable by Laws of 1891, chapter 215, in effect April 20, 1891, and it was not until March 16, 1903, that transfers of real property situated in New York to persons of 1% class were made taxable by Laws of 1903, chapter 41. It was held in *Matter of Stewart*, 131 N. Y. 274, that under the 1885 act transfers to collaterals by power of appointment were taxable when the power was exercised.

1900.

MATTER OF ELBRIDGE G. SPAULDING, 163 N. Y. 607,
affirms, without opinion, 49 App. Div. 541, which affirmed
22 Misc. 420.

Elbridge G. Spaulding died a resident on May 5, 1897, eighty-seven years of age. (Page 544) He "had never been sick or required the services of a physician until about the middle of March, 1897, less than two months prior to his death. In the winter of 1895-1896, a few months after the death of his wife, the deceased became quite feeble physically, which feebleness gradually increased until his death, which was caused, as stated in the certificate of the attending physician, by 'old age.' The deceased was at no time afflicted with an acute disease; there was simply a gradual depletion of physical power, commencing shortly after the death of his wife in August, 1895, which became more and more marked until his death, two years later; but during all that time his mental faculties remained unimpaired."

In November, 1895, he told his son (page 544) "in substance that he had gotten to be a pretty old man, or a very old man; that his estate was a burden to him; that he intended to give it ultimately to his children, and proposed to give some of it to them at that time. The deceased thereupon gave to the son securities amounting in value to \$1,038,900, to be divided between himself and the other two children equally. The son took the securities, locked them up in a box, labeled it with the names of the three children, and put it back where it had been kept by the father. In July, 1896, he again sent for his son and repeated in substance the statement which he made when the first gift of securities was made; said that he wanted to increase the amount so that each of his children would have \$500,000, and told his son to make up a list of bonds for that amount and submit it to him. The son did so two or three days later; then the deceased told the son to go to the safe and get the bonds, which he did; these bonds amounted to \$461,100, and with the securities previously given aggregated \$1,500,000, or \$500,000 to each of the children.

"These securities were placed in the box containing the securities which had previously been given, and they were all then deposited by the son in the safe deposit vaults of the Marine Bank in the city of Buffalo, deposited in a box taken in the

name of the donees, who had the combination, so that any of them had access to it.

"The testator never saw any of the securities after they were given to the respondents as above stated; never exercised or attempted to exercise any control over them in any respect whatsoever. All the interest coupons which remained attached to the securities were collected by and paid to the donees; each of the donees was assessed a small amount on account of being the owner of such securities, and the assessment on the testator's property was reduced proportionately, but such assessments and reduction did not represent the actual value of the securities transferred."

The court say, page 542: "The sole question presented by this appeal is, were the gifts made by the decedent to his three children, aggregating \$1,500,000, made in contemplation of death, within the meaning of the statute?"

Chapter 399 of the Laws of 1892, which was in force when the first gift in question was made, provides:

"Section 1. *Taxable Transfers*.—A tax shall be and is hereby imposed upon the transfer of any property, real or personal, of the value of \$500 or over, or of any interest therein or income therefrom, in trust or otherwise, to persons or corporations not exempt by law from taxation on real or personal property in the following cases. * * *

"'3. When the transfer is of property made by a resident or by a non-resident, when such non-resident's property is within this state, by deed, grant, bargain, sale or gift made in contemplation of the death of the grantor, vendor or donor, or intended to take effect in possession or enjoyment, at or after such death.' * * *

"These provisions were incorporated verbatim in chapter 908 of the Laws of 1896, section 220, which was the statute in force at the time the second gift in question was made, and at the time of the decedent's death. * * *

"(Page 546.) Were the gifts in question made 'in contemplation of death,' within the meaning of the statute?"

"It will not be contended that a literal construction of the provision of the statute would be reasonable, or was intended by the legislature.

"If a person, fully realizing that his death is to occur within a few hours, should convey by deed real estate and receive the full consideration therefor, it would not be claimed that the

real estate so conveyed would be subject to the tax in question, notwithstanding the conveyance was clearly made in contemplation of death. Or, if a person under such circumstances should transfer personal property in payment of a just debt, and with the avowed purpose of having the matter adjusted before his death, the statute would not apply, and yet the transaction would be within its provisions if literally construed.

"A man of middle age, in full health and strength, may transfer his house and lot and other property to his wife, for the purpose of securing her against want in case of his death and declare such purpose in the deed of conveyance. Clearly such conveyance would be made in contemplation of death, but if the grantor lived ten, fifteen or thirty years after, the property would not be subject to the tax, and this is so, notwithstanding the transaction is within the precise words of the statute.

"A father may have been engaged in business during a lifetime, in which he has accumulated and has invested therein a fortune; he is becoming old, less active, more infirm and feeble, and less able to conduct the business. He concludes to and does give and transfer the business to a trusted son. It was not transferred or received for the purpose of evading the transfer tax, but because the father wished to observe the management of the business by the son before his death, and to be relieved of its burden. The father lives five or ten years after the transfer, which was concededly made because he understood and believed that death was not far distant. So far as he knew, there was no immediate danger; he was enjoying the same degree of health at the time he transferred the business to his son that he had enjoyed for years previous. Under such circumstances we think it could not be successfully urged that the property and business transferred was subject to tax under the statute in question, and yet such a transfer would fall directly within its provisions if given a literal interpretation.

"In the case at bar, as we have seen, there was nothing to indicate to the decedent at the time the gifts in question were made that he was in immediate danger of death. The evidence only tends to show that he was an old man; somewhat enfeebled; gradually declining in physical power. Whether he was to live one, two or five years, he did not know and could not have known; that he was to die immediately or within a few days he had no reason to expect; that he was to die within a few years he knew to a certainty. * * *

“(Page 549.) If we bear in mind the distinction between a gift *inter vivos* and a gift *causa mortis*, and that a gift which would otherwise be *inter vivos* may become a gift *causa mortis*, if made *in extremis* or under circumstances which would entitle the donor to recover it back, we think the rule may be stated to be that the property transferred by gifts *inter vivos* is not taxable under the provisions of the Taxable Transfer Act, unless made and received with the intent and for the purpose of evading its provisions. * * *

“(Page 550.) That the gifts in question were gifts *inter vivos*, were not made under circumstances which impressed them with the distinguishing characteristics of gifts *causa mortis*, were not made by the donor or received by the donees with the purpose or intent of evading the provisions of the statute in question, is clearly established by the evidence; and we think that, under the authorities, it follows that the property which was transferred by such gifts, was not transferred ‘in contemplation of death,’ within the meaning of the statute, and is not taxable under its provisions.”

Vide subdivision 4 of § 220; Matter of Hess, 110 App. Div. 476-478, affirmed, on opinion of Spring, J., 187 N. Y. 554; Matter of Bullard, 76 App. Div. 207-208; Matter of Baker, 83 App. Div. 530-533, affirmed on opinion below, 178 N. Y. 575; Matter of Demers, 41 Misc. 470-473; Matter of Graves, 52 Misc. 433-436; Matter of Farrell, N. Y. Law Journal, January 3, 1912, opinion quoted page 797; Matter of McKeon, id., June 8, 1912, opinion quoted page 647; and cases cited sub Contemplation of Death. Matter of Keeney, 194 N. Y. 281, sustained in 222 U. S. 525, *sub nom.* Keeney v. New York.

Criticised in Matter of Price, 62 Misc. 149-151.

Matter of Dee, N. Y. Law Journal, December 6, 1913, opinion quoted page 645.

1901.

MATTER OF THE APPRAISAL, ETC., OF THE TRUST ESTATE CREATED BY EUGENE G. CRUGER BY A DEED OF TRUST, 166 N. Y. 602, which affirms, on opinion below, 54 App. Div. 405.

Eugene G. Cruger by deed of trust, dated September 13, 1892, in which his wife joined, assigned and transferred to two trustees certain personal property, in trust; (1) To keep the principal invested as directed and collect the income, and, after deducting taxes and expenses, during his life to pay: To his daughter Angele, her executors and administrators, the sum of \$1,200

annually in equal monthly payments; and any balance of said income to him, the said Cruger. (2) At his death to pay over the trust fund and any accumulated income to Angele Cruger, if living, or, if she be dead, then to her issue, or, in default of issue, then to such persons as Angele Cruger should by will appoint, or, in default of such appointment, then to such persons as would be entitled to the same under the laws of New York had Angele Cruger died intestate and in possession of the property (except her mother, Meta K. Cruger, who, by the terms of said instrument, released her claim thereto).

Angele Cruger died September 2, 1896, intestate, unmarried, without issue and without having executed her power of appointment under said trust instrument.

Eugene G. Cruger, who created the trust, died April 4, 1898, leaving him surviving his three children, half-brothers and sisters of Angele Cruger, and her only next of kin (except her mother, who was excluded from the succession), and as such entitled to the corpus of the trust estate.

Held, that the case fell squarely within the terms of that portion of the statute which provided: "When the transfer is of property * * * by deed, grant, bargain, sale or gift * * * intended to take effect, in possession or enjoyment, at or after" the death of the grantor, vendor or donor.

Vide subdivision 4 of § 220, and cases cited sub Trust Deed.

1901.

MATTER OF DAVID DOWS, 167 N. Y. 227, sustained in 183 U. S. 278, sub nom. Orr v. Gilman.

The court say, page 229: "David Dows, Sr., died March 30th, 1880, leaving as a part of his estate a valuable piece of real property which he devised to his trustees in trust to pay the income to his son David Dows, Jr., during life, 'And upon the death of my said son the said property, with all accumulations of interest, income and profits shall vest absolutely, and at once, in such of his children him surviving, and the issue of his deceased children as he may by his last will and testament designate and appoint, and in such manner, and upon terms as he may legally impose. But in case my said son, David Dows, Jr., die intestate, then said property, with all accumulations of interest, income and profits shall vest absolutely and at once in his chil-

dren him surviving, share and share alike, and the issue of his deceased children (such issue to take share and share alike the portion which the parent would have received if living) to be paid to them at the times and in the proportion following, to wit.' A similar devise was made of a share of the testator's residuary estate. The will gave the trustees a power of sale over the real property, which was exercised during the life of David Dows, Jr., and a large portion of the proceeds invested in the stocks of corporations.

"David Dows, Jr., died January 13th, 1899, leaving a last will and testament, by which he exercised the power of appointment given him by the will of his father, in favor of his three sons. By his will he gave to each of his sons the income of three undivided forty-eighths till his son Robert attained the age of twenty-one years or sooner died, of four forty-eighths until Robert attained twenty-five years or sooner died, and nine forty-eighths until Robert attained thirty years or sooner died. Thus each son was given the income of sixteen forty-eighths or one-third of the property. At the termination of these life estates the principal was given to another son. That is to say, to B was given the principal of the share, the income of which A had been receiving; to C the principal of what had been B's share, and to A the principal of C's share. In result each son receives one-third of the property absolutely, for the will provides 'that each interest for life or remainder shall vest absolutely and at once upon my death, in legal and not equitable ownership, and without contingency.' But each son instead of being given the remainder in his own share after Robert arrives at the age of thirty years is given the remainder in another son's share, though the shares are exactly equal."

The first point raised by the estate was that the tax imposed under the amendment of April 16th, 1897 (chap. 284), to the Taxable Transfer Act of 1896, upon transfers made under a power of appointment, is a tax on property and not on the right of succession, and that, therefore, so much of the fund as was invested in incorporated companies liable to taxation on their own capital and in certain bonds of the state of New York and bonds of the city of New York exempt from taxation by statute, was not subject to the tax. The court quote (page 231) from *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283: "They are based on two principles: 1. An inheritance tax is not one on property, but one on the succession. 2. The right to take

property by devise or descent is the creature of the law, and not a natural right—a privilege and, therefore, the authority which confers it may impose conditions upon it. From these principles it is deduced that the states may tax the privilege, discriminate between relatives and between these and strangers, and grant exemptions, and are not precluded from this power by the provisions of the respective state constitutions requiring uniformity and equality of taxation.”

The estate also raised the point that the title of the present owners is deduced from the will of David Dows, Sr., and not from that of his son David Dows, Jr. The court say, page 231: “Whatever be the technical source of title of a grantee under a power of appointment, it cannot be denied that in reality and substance it is the execution of the power that gives to the grantee the property passing under it. The will of Dows, Sr., gave his son a power of appointment to be exercised only in a particular manner, to wit, by last will and testament. If, as said by the Supreme Court of the United States, the right to take property by devise is not an inherent or natural right, but a privilege accorded by the state which it may tax or charge for, it follows that the right of a testator to make a will or testamentary instrument is equally a privilege and equally subject to the taxing power of the state. When David Dows, Sr., devised this property to the appointees under the will of his son, he necessarily subjected it to the charge that the state might impose on the privilege accorded to the son of making a will.”

Another objection urged against the order appealed from is, that at the death of David Dows, Sr., the property was real estate on which there was at that time no transfer tax as against lineal descendents of the testator. In *Matter of Sutton* (3 App. Div. 208; affirmed on opinion below, 149 N. Y. 618) the will directed an equitable conversion of the realty into personalty. It was held that the actual form in which the property existed at the time of the testator's death determined its liability to a transfer tax, and that being real estate, it was exempt. The same rule governs the present case. At the time of the execution of the power of appointment the property was personalty, and the transfer thereof taxable.¹

The estate also contended that the legatees or devisees of the remainders are not subject to taxation until the precedent estates terminate and the remainders vest in possession. The court say, page 233: “Under a statute substantially the same

in phraseology, this court held, by Finch, J., in *Matter of Hoffman* (143 N. Y. 327), that mere possibilities or chances of the acquisition of property, including not only contingent estates, but also estates technically vested, but liable to be divested, were not liable to taxation until the contingencies had passed or been fulfilled, and the right to succeed to property become certain and absolute. This doctrine has no application to the remainders given to the sons of David Dows, Jr. They are absolute and not subject to be divested or to fail in any contingency whatever. * * * By the aid of the table of annuities, upon the faith of which large sums are constantly distributed by the courts, the present value of these remainders is capable of ready computation."

Vide subdivision 6 of § 220 and § 230; *Matter of Cooksey*, 182 N. Y. 92; *Matter of Lansing*, 182 N. Y. 238-247-248; *Matter of Hull*, 111 App. Div. 322-325, affirmed, without opinion, 186 N. Y. 586; *Matter of Kidd*, 188 N. Y. 274-278; *Matter of Fearing*, 200 N. Y. 340-344; *Matter of Bushnell*, 73 App. Div. 325; affirmed, without opinion, 172 N. Y. 649; *Matter of Rogers*, 71 App. Div. 461-465, affirmed, on opinion below, 172 N. Y. 617; *Matter of Miller*, 77 App. Div. 473-481; *Isham v. N. Y. Assn. for the Poor*, 177 N. Y. 218-223; *Matter of Delano*, 176 N. Y. 486-493, sustained in 205 U. S. 466, *sub nom.* *Chanler v. Kelsey*; *Matter of Buckingham*, 106 App. Div. 13-19; *Matter of Smith*, 150 App. Div. 805-809; *Matter of Runcie*, 36 Misc. 607; *Matter of Babcock*, 37 Misc. 445, affirmed, without opinion, 81 App. Div. 645; *Matter of Warren*, 62 Misc. 444-447; *Matter of Kissel*, 65 Misc. 443-444, affirmed, without opinion, 142 App. Div. 934; *Matter of Frazier*, N. Y. Law Journal, March 28, 1912, opinion quoted page 778. ⁴ *Matter of Penfold*, 142 N. Y. Supp. 678-680.

¹ *Matter of Tucker*, 27 Misc. 616.

1901.

**MATTER OF ZEFITA, COUNTESS DE ROHAN-CHABOT,
167 N. Y. 280.**

Henry Heyward, the father of the Countess, died in 1874, a resident of the city of New York. By his will (page 282) "he directed that his property, after the payment of debts and a certain legacy, be divided into three equal shares, only one of which is involved in this proceeding. He bequeathed to his wife the one-third share in controversy here, for life, or during the time that she should remain his widow; the remainder he gave to his son and daughter. He vested in his widow the power to appoint said remainders to such of his lineal descendents

as she, by her will, might direct. The wife alone qualified as executrix, and prior to the year 1880 she had distributed the estate and received her final discharge. The son died in the year 1879, sixteen years before the decease of his mother, who died in 1895, having exercised the power of appointment in her will in favor of her daughter. The mother's will was offered for probate in the county of New York, and, after contest, admitted to probate on the 29th day of February, 1896. It so happened that the Countess died on that day in the city of Paris, where she resided. The Countess was made the residuary legatee under her mother's will. The son, Frank, who died in the year 1879, devised and bequeathed his property to his mother for life and the remainder to his sister. The Countess, in a codicil to her will, constituted the appellant, Jennie McLean, her residuary legatee. Mrs. Heyward, the mother, was not only at the time of her death, in the enjoyment of the life estate left her by her husband and son, but was also possessed of a considerable amount of personal property in her own right. The will of the Countess, which was also contested, was admitted to probate in the county of New York on the 19th day of January, 1898. Mrs. Heyward, her daughter, and Miss Jennie McLean all resided in Paris, France."

The court (page 283) "treated the property liable to taxation as divided into three groups—that which the mother took for life under the will of her son, the remainder passing at her death to the Countess; that in which the mother was vested with an estate for life under the will of her husband, with remainder to the Countess; that owned by the mother at the time of her death and passing under her will, which named the Countess as residuary legatee."

Held, (page 283) "that the two estates in remainder, which vested absolutely in the Countess on the death of her mother under her father's and brother's wills, respectively, were taxable in passing to the appellant, Miss McLean, as residuary legatee of the Countess," and "that the amount to which the Countess was entitled as the residuary legatee under her mother's will was not taxable, it appearing that there had been no settlement of the executor's accounts under the will, and, consequently, the amount of the residuary estate, if any there should be, was unascertained." ¹

Vide subdivision 2 of § 220, and § 243 for law relating to transfers subsequent to amendment by chapter 732, Laws of 1911, in effect July 21, 1911.

As to law prior to 1911 amendment vide *Matter of Clinch*, 44 Misc. 190, affirmed, 180 N. Y. 300. For present law in non-resident estates vide *supra*, page 133.

Vide etiam *Matter of Lord*, 111 App. Div. 152-157, affirmed, without opinion, 186 N. Y. 549, sustained in 211 U. S. 477, *sub nom. Beers v. Glynn*; *Matter of Huber*, 86 App. Div. 458-461; *Matter of Ames*, 141 N. Y. Supp. 793-796.

¹ *Matter of Clinch*, 180 N. Y. 300-303; *Matter of Gans*, N. Y. Law Journal, April 13, 1912, opinion quoted, *post*, page 862; *Matter of Sterry*, *id.*, April 30, 1912, *post*, page 862.

1901.

MATTER OF CHARLES P. HUNTINGTON, 168 N. Y. 399.

Testator died a resident April 20, 1900. He bequeathed money to several charitable institutions. The court held that under the statute as it then existed, none of the charitable institutions were exempt, and imposed transfer tax upon each legacy.

Vide § 221; *Matter of Watson*, 171 N. Y. 256-259; *Matter of Mergentime*, 129 App. Div. 367-375, affirmed, on opinion below, 195 N. Y. 572; *Matter of Moses*, 138 App. Div. 525-526; *Matter of Arnot*, 145 App. Div. 708, affirmed, without opinion, 203 N. Y. 627; *Matter of White*, 118 App. Div. 869-872; *Matter of Kucielski*, 144 App. Div. 100; *Matter of Crouse*, 34 Misc. 670-674; *Matter of Higgins*, 55 Misc. 175-178; *Matter of Robinson*, 80 Misc. 458-462.

As to present exemptions vide *supra*, page 40.

1901.

MATTER OF SARAH M. ALTHAUSE, 168 N. Y. 670, affirms, without opinion, 63 App. Div. 252.

Testator died a resident March 6, 1900. Leasehold interest in real property held to be personal property, and therefore a transfer taxable under the statute of 1896 which did not tax transfers of real property to lineals.

Vide § 220. Transfers of real property situate within the state first taxable to "lineals" by chapter 41, Laws of 1903, in effect March 16, 1903. Vide *Matter of Vivanti*, 138 App. Div. 281 (206 N. Y. 656), holding that perpetual lease, reserving rent, is real property; *Matter of John H. Rosenbaum*, N. Y. Law Journal, August 7, 1913, opinion quoted sub Leasehold.

1902.

MATTER OF GEORGE A. BRANDRETH, 169 N. Y. 437,
reverses 58 App. Div. 576, and affirms 28 Misc. 468.

Testator died November 15, 1897. In 1893 he transferred to his four daughters certain stock, reserving to himself the dividends on said stock until his death, and also the right to vote on said stock. The appraiser and the surrogate held that the stock so transferred by Brandreth to his children was subject to tax under the provisions of article 10 of the Tax Law. The Appellate Division by a divided court reached a contrary conclusion and reversed the decree of the surrogate in this respect.

The court say, page 440: "The order of the Appellate Division does not recite that the reversal was on the facts and, therefore, it must be assumed that it was made solely on the law, the facts as found below being undisturbed provided there is any evidence to sustain them. * * * Both the appraiser and the surrogate found that the transfer was made in contemplation of death, and if that inference can be drawn from the evidence, the finding is conclusive upon us. We do not deem it necessary, however, to enter upon this inquiry, as in our opinion on the conceded facts, the transfer was subject to tax. * * * (Page 441.) By subdivision 3, section 220 of the Tax Law, it is declared that a tax shall be imposed 'when the transfer is of property made * * * in contemplation of the death of the grantor, vendor or donor, or intended to take effect in possession or enjoyment at or after such death.' The section provides for two different cases; the first where the transfer is in contemplation of the death of the donor; the second, where it is intended to take effect in possession or enjoyment at or after such death. In the second case, it is not necessary that the transfer should be made in contemplation of death; the liability to taxation depends solely on the character of the interest or estate transferred. * * * (Page 442.) In *Matter of Green* (153 N. Y. 223), the donor transferred personal property in trust to apply the income to herself during life and upon her death to divide the same among her nieces, with provision for substitution in case of the death of any niece before the donor. It was held that the transfer was subject to the tax. * * * In the *Green* case the donor reserved the power to modify the terms of the trust with the consent of the trustee, while in the present case, the remainder given the daughters was absolute, and not subject

to be divested in any contingency whatever. But this difference does not affect the statutory liability to taxation, since in both cases the gift took effect in possession and enjoyment only on the death of the donor."

The order of the surrogate was affirmed. The stock in question was that of Porous Plaster Company, the stock of which was owned and controlled by the Brandreth family. It appeared from the evidence that there had been but one sale, and that by the sheriff of one share, and the life interest in another share, which took place over a year before the decedent's death. The stock was valued at 400 per cent, the appraiser placing a half of the value upon certain secret remedies and the good will; the stock had earned and paid for seventeen years from 48 to 60 per cent upon its par value.

The surrogate saying, page 473: "While the earning power of a corporation is not proof of the value of its property, nevertheless it is competent evidence of value, and is a feature to be considered in determining the valuation to be placed upon the stock for the purposes of taxation."

The surrogate also said, page 472: "It is at once apparent that it is practically impossible to produce expert evidence of the market value of this particular stock, and the only manner of arriving at its value is by taking into consideration the actual property of the corporation and its earning capacity. Ordinarily, it would be difficult for an appraiser to get at the actual property of a corporation to fix the value of its shares. In most cases it would be impracticable for an appraiser to attempt to make up a balance sheet of the assets and liabilities of a corporation in order to appraise its shares, and this method can only be resorted to, if practicable, when the stock has no market value which can be ascertained. * * *

"Again, at page 474: Where it is impossible for an appraiser to ascertain a market value of the stock of a corporation by reason of the fact that there is none, the state does not thereby lose the tax upon the transfer. Under such circumstances the actual value will be presumed to be the market value until the contrary is shown." ¹

Vide subdivision 4 of § 220. Matter of Hess, 110 App. Div. 476-480, affirmed, on opinion of Spring, J., below, in 187 N. Y. 554; Matter of Keeney, 194 N. Y. 281-285, sustained in 222 U. S. 525; Matter of Cornell, 170 N. Y. 423-425; Matter of Bullard, 76 App. Div. 207-209; Matter of Miller, 77 App. Div. 473-483; Matter of Skinner, 45 Misc. 559-563, modi-

fied as to other points, 106 App. Div. 217; Matter of John Palmer, 117 App. Div. 360-366; Matter of Borup, 28 Misc. 474; Matter of Sharer, 36 Misc. 502; Matter of Proctor, 41 Misc. 79-82; Matter of Dobson, 73 Misc. 170; Matter of Loewi, 75 id., 57; Matter of Spring, 75 id., 586; Matter of Heiser, N. Y. Law Journal, July 19, 1913, opinion quoted, page 804.

¹ Vide cases cited sub Closely Held Stock, page 612.

1902.

MATTER OF CAROLINE REMSEN GIHON, 169 N. Y. 443.

The case involves the propriety of the deduction of three certain items in the assessment of the value of the testator's estate for the purpose of the imposition of a transfer tax. The probate of the will was contested and in the proceedings arising on such contest a temporary administrator was appointed. The amount of his fees and disbursements was deducted from the value of the estate. The appellant challenges the correctness of this allowance.

The court say, page 445: "The amount represented by the expenditures of the administrator or the expense of administration never passes to the legatee or next of kin, and, therefore, is not subject to the tax. This was the rule held by this court in Matter of Westurn (152 N. Y. 93), though the appellant claims that that case is authority for a contrary doctrine. There the will was rejected and the next of kin sought a deduction of the amount expended by them in the contest. It was held that such a deduction was properly refused on the ground that these were expenditures made by the next of kin personally and not by the legal representatives of the deceased in the administration of his estate. It is true that in the judgment which finally rejected the will the costs of the parties were charged upon the estate, but, as pointed out by Chief Judge Andrews, such judgment was in reality merely a judgment in favor of their attorneys against the parties themselves."

One-half of the residuary estate was left in trust, the income to go to the testator's daughter during life and upon her death the principal to her issue, or, in default of issue, over. The surrogate deducted the commissions of the trustees from the amount of the estate. The court say, page 446: "There is a distinction that may be made between the commissions of executors or administrators whose appointment is an absolute essential to the lawful liquidation of an estate and those of trustees who are ap-

pointed solely for the protection of the property of the beneficiary, and it may be urged that such latter commissions should be considered as an expenditure for his benefit. Whatever force there may be in this view, we think the deduction of the trustees' commissions is justified and required by section 227 (now 226) of the Tax Law itself, which prescribes that any legacy or devise to trustees in excess of their commissions allowed by law shall be taxable, thus necessarily implying that legal commissions shall be exempt."

A deduction of the amount of the Federal Inheritance Tax was made, and the court in disallowing the deduction say, page 447: "The Federal tax is of exactly the same nature as the state tax; a tax not on property, but on succession; that is to say, a tax on the legatee for the privilege of succeeding to property. (*Knowlton v. Moore*, 178 U. S. 41.) * * * Therefore, though the administrator or executor is required to pay the tax, he pays it out of the legacy for the legatee, not on account of the estate. * * * No one questions that where a legacy is given for a specified amount the tax must be deducted from the amount of the legacy and the balance only given to the legatee. A testator may direct that the tax on a particular legacy shall be paid out of his estate; nevertheless, in reality, the tax is still paid out of the legacy, the effect of the direction of the testator being merely to increase the legacy by the amount of the tax. * * * (Page 448). The full amount of the legacy is in law paid to the legatee and the deduction made from it and paid to the state or Federal government is paid on account of the legatee from the legacy which he receives." ¹

Vide § 226. *Matter of Willets*, 119 App. Div. 119-124, affirmed, without opinion, 190 N. Y. 527; *Matter of Maresi*, 74 App. Div. 76-80; *Matter of Dimon*, 82 App. Div. 107-109; *Matter of Townsend*, 153 App. Div. 85-87, appeal pending; *Matter of Liss*, 39 Misc. 123-124; *Matter of Thomas*, 39 Misc. 223-225; *Jackson v. Tailer*, 41 Misc. 36-38, affirmed, on opinion below, 96 App. Div. 625, which was affirmed, without opinion, 184 N. Y. 603; *Matter of Sanford*, 66 Misc. 395-398; *Matter of Smith*, 80 Misc. 140-143; *Matter of Shields*, 68 Misc. 264-267.

As to payment of tax vide *Matter of Meyer*, 209 N. Y. 386.

¹ Deduction for inheritance tax imposed by foreign state not allowed. *Matter of Kennedy*, 20 Misc. 531; *Matter of Penfold*, 142 N. Y. Supp. 678-679.

1902.**MATTER OF JOHN A. MANNING, 169 N. Y. 449.**

The son of the testator was wholly insolvent, and although the legacy to him was more than sufficient to pay the debt, the amount of the debt was deducted from the assets of the estate as being of no value. The court say, page 451: "The question is whether this worthless account is to be deemed to be property transferred or disposed of by the will, within the contemplation of the statute, and to be included in the value of the estate for the purpose of taxation. The tax is imposed upon the shares of the estate that the beneficiaries take under the will, and the account or item in question does not represent any property that passed from the deceased to anyone, within the fair meaning of the statute, and, hence, the final order of the surrogate excluding the account from the estimated value of the estate was correct.¹

"It is said, however, that if this item is not included in the value of the estate for the purpose of imposing the transfer tax it should not have been included in the inventory for the purpose of fixing the executor's commissions, as it was. It is quite probable that this contention is correct, but the question is not involved in this appeal. If the item had been excluded from the inventory when the commissions of the executor were fixed and allowed by the surrogate, it would increase the tax payable to the state to the extent of about eight dollars. There was no question raised or objection made by anyone at any stage of the proceedings in regard to the amount of the commissions of the executor. It has been assumed at every stage of the controversy that the deductions made by the surrogate for the expenses of administration were correct, and the only question litigated was in regard to the account as an item of property, to be estimated as part of the estate upon which the statute imposes the tax. The position thus assumed cannot be changed upon the appeal in this court. It cannot be contended for the first time in this court that there was some trifling mistake made by the surrogate in computing the expenses of administration.

"Moreover, the statute which permits an appeal from the order of the surrogate required the appellant to state in the notice of appeal 'the ground upon which the appeal is taken.'² (Laws of 1892, chap. 399, section 13.) The only grounds stated in the notice of appeal is the order of the surrogate in regard to the valuation of the item or account referred to. This appeal was

brought by the executor, and the public authorities acquiesced in everything decided by that order. If the surrogate had committed an error in adjusting the commissions of the executor at too large a sum, they, also, could have appealed from his decision and required him to modify it in that respect. The purpose of requiring the notice of appeal to the surrogate to state the grounds the appeal was made upon was to limit the questions to be reviewed by him to those only stated in the notice."

¹ *Morgan v. Warner*, 45 App. Div. 424-427, affirmed, on opinion below, 162 N. Y. 612; *Matter of Wood*, 40 Misc. 155.

² Section 232; *Matter of Cook*, 194 N. Y. 400; *Matter of Stone*, 56 Misc. 247-248.

1902.

MATTER OF CHARLES W. CORNELL, 170 N. Y. 423.

Testator died a resident May 9, 1898, having within two years before his death transferred the bulk of his estate, the agreement of transfer providing "Whereas, the said party of the second part has lately sold and transferred to the party of the first part certain securities, a schedule of which is hereto annexed, under the agreement and understanding that the party of the second part should during his life have all or such part of the net income of such securities as he might wish." There was no power of revocation reserved.¹

Held, that the transfer was taxable as a gift intended to take effect at death.

The surrogate reduced the interest on the unpaid tax from ten to six per cent. The court say, page 426: "We think on this record the matter rested in the discretion of the surrogate and that we are not justified in interfering with its exercise."²

Vide subdivision 4 of § 220. *Matter of Hess*, 110 App. Div. 476-481-483, affirmed on opinion of Spring, J., below, in 187 N. Y. 554; *Matter of Keeney*, 194 N. Y. 281-285, sustained in 222 U. S. 525, *sub nom.* *Keeney v. New York*; *Matter of Bullard*, 76 App. Div. 207-209; *Matter of Skinner*, 46 Misc. 559-563, modified as to other points, 106 App. Div. 217; *Matter of John Palmer*, 117 App. Div. 360-367; *Matter of Dobson*, 73 Misc. 170; *Matter of Loewi*, 75 id. 57-62; *Matter of Spring*, 75 id. 586; *Matter of Barbey*, 114 N. Y. Supp. 725; *Matter of Heiser*, N. Y. Law Journal, July 19, 1913, opinion quoted, page 804.

¹ As to power of revocation vide *Matter of Brandreth*, 169 N. Y. 437-442, *supra*, page 254.

² *Matter of Read*, 204 N. Y. 672; § 223.

1902.**MATTER OF NATHAN F. GRAVES, 171 N. Y. 40.**

The testator died on July 21, 1896, and chapter twenty-four of the General Laws, in relation to taxation (chapter 908 of the Laws of 1896), which includes in article ten the provisions as to taxable transfers, took effect June 15, 1896. Section 220 provided: "A tax shall be and is hereby imposed upon the transfer of any property, real or personal, of the value of Five hundred dollars or over, or of any interest therein or income therefrom, in trust or otherwise, to persons or corporations not exempt by law from taxation on real or personal property, in the following cases."

In § 4, subdivision 7, it is provided that there shall be exempted from taxation "the real property of a corporation or association organized exclusively for the moral or mental improvement of men or women, or for religious, bible, tract, charitable, benevolent, missionary, hospital, infirmary, educational, scientific, literary, library, patriotic, historical or cemetery purposes, or for the enforcement of laws relating to children or animals or for two or more of such purposes, and used exclusively for carrying out thereupon one or more of such purposes and the personal property of any such corporation or association shall be exempt from taxation."

The language of the testator in the tenth subdivision of his will, was as follows: "I give, bequeath and devise all the rest and residue of my property of every kind, personal or real, wherever situate, to my trustees hereinafter named, for the purpose of founding, erecting and maintaining the Graves Home for the Aged, to be located in the city of Syracuse in the State of New York."

The court say, page 47: "It is quite possible that the trustees, upon whom devolved the duty of founding, erecting and maintaining this home, may find it more convenient to incorporate it as a charitable corporation, but under the law of 1893 and the provisions of the will quoted, it is not essential that this should be done. The imposition of the transfer tax upon the residuary estate cannot be sustained."

The court also say, page 46: "In a recent statute (chapter 382 of the Laws of 1900) the Tax Law was amended so as to make the general exemptions provided for in section four inapplicable to article ten relating to taxable transfers." The court held that

the amendment was not retroactive. The amendment is now § 244 of the present statutes.

Vide §§ 221 and 244. Vide *Matter of Arnot*, 203 N. Y. 627; *Matter of Daly*, 79 Misc. 586; *Matter of Robinson*, 80 Misc. 458-461, appeal pending, *Matter of Neustadter*, N. Y. Law Journal, August 16, 1913, opinion quoted sub *Exemptions*, page 688; *Matter of McCartin*, id., December 5, 1913, opinion quoted sub *Charitable Corporations*, page 608.

1902.

MATTER of WALDEN PELL, 1st, 171 N. Y. 48.

The court say, page 51: "The testator, Walden Pell, 1st, died in the city of New York on the 14th day of April, 1863, and by the terms of his will he gave a life estate in all his property to his widow, with remainders over at her death in equal shares (after making various bequests of personal property) to his nephews and nieces and the issue of any deceased nephew or niece, together with one equal share thereof to his sister Emma. The life tenant, the widow, died on the 20th day of December, 1899, at which time all the estates in remainder came into the actual possession and enjoyment of the beneficiaries under the will and codicil.

"It is not disputed that under this will the bequests of personal property and the estates upon remainder of real estate vested in the beneficiaries at the time of the testator's death. Notwithstanding the vesting of these estates in the year 1863, it is contended on behalf of the comptroller of the city of New York that they are subject to the payment of the transfer tax, under an amendment of the general statute providing for taxable transfers (Laws 1899, chapter 76), being article 10 of an act in relation to taxation, constituting chapter 24 of the General Laws (chapter 908 of the Laws of 1896, pp. 795, 868), which reads as follows: 'All estates upon remainder or reversion which vested prior to June 30, 1885, but which will not come into actual possession or enjoyment of the person or corporation beneficially interested therein until after the passage of this act shall be appraised and taxed as soon as the person or corporation beneficially interested therein shall be entitled to the actual possession or enjoyment thereof.'

"This amendment of 1899 became a law on March 14th of that year, the life tenant dying in the following December. It is conceded that the remainders in this case are controlled by this

amendment if it can be sustained as a valid exercise of legislative power.

"The appellant insists that this amendment imposing a succession or transfer tax upon estates which vested April 14th, 1863, is retroactive and attempts to tax estates and rights which had vested long before its enactment; that this being so, it violates the constitution of the United States, which forbids any law impairing the obligations of contracts, and also the constitution of the State of New York which prohibits the taking of private property for public use without compensation.

"The appellant does not attack the constitutionality of the law simply because it is retroactive, but for the reason that it is both retroactive and effective to impair vested rights.

"The language of this amendment of 1899 would seem to include all remainders created by deed or will which come within the restricted time limitation therein fixed."

Held, (page 60) "that the amendment of 1899, whether regarded as part of the act relating to taxable transfers, or an attempt on the part of the legislature to exercise its general power of taxation, is unconstitutional and void."

This provision was expunged from the statute by chapter 368, Laws of 1905.

Vide *Matter of Scrimgeour*, 175 N. Y. 507; *Matter of Craig*, 97 App. Div. 289-293, affirmed, on opinion below, in 181 N. Y. 551; *Matter of Kidd*, 188 N. Y. 274-279; *Matter of Ripley*, 122 App. Div. 419-423, affirmed, per curiam, 192 N. Y. 536; *Matter of Chapman*, 133 App. Div. 337-338, appeal dismissed, without opinion, 196 N. Y. 561; *Matter of Delano*, 176 N. Y. 486-495, sustained in 205 U. S. 466, *sub nom.* *Chanler v. Kelsey*; *Matter of Meyer*, 83 App. Div. 381-384; *Matter of O'Berry*, 179 N. Y. 285-287; *Matter of Hagerty*, 128 App. Div. 479-482, affirmed, without opinion, 194 N. Y. 550; *Matter of Smith*, 150 App. Div. 805-808; *Matter of Haight*, 76 Misc. 380-382, affirmed, 152 App. Div. 228.

1902.

MATTER OF LUCINDA A. WATSON, 171 N. Y. 256, reverses 70 App. Div. 623 and 36 Misc. 504.

Testatrix died a resident September 18, 1900. By her will she bequeathed \$500 to the Young Men's Christian Association of the city of Rome and \$2,000 to the Missionary Society of the Methodist Episcopal Church.

The court say, page 258: "Prior to 1896, article 10 of the Tax Law was a separate statute known as the Transfer Tax Law. In that year it was incorporated into the Tax Law together with

other statutes relating to taxation, the legislative intent being to codify all the statutes relating to that subject into one consolidated act. After such consolidation, section 4 of the Tax Law provided that the real and personal property of a 'corporation or association organized exclusively for the moral or mental improvement of men or women, or for religious, bible, tract, charitable, benevolent, missionary, hospital, infirmary, educational, scientific, literary, library * * * purposes' should be exempt from taxation. As the statutes then stood, it is conceded that the legacies to these two corporations would have been exempt.

"In 1900, by chapter 382 of the laws of that year, the Tax Law was amended by adding section 243 to article 10 thereof. That section reads: 'The exemptions enumerated in section 4 of the Tax Law, of which this article is a part, shall not be construed as being applicable in any manner to the provisions of this act.' This law went into effect before the death of the testatrix. This new section, it will be observed, had the effect of taking from these corporations the benefit of the exemptions provided by section 4, and the legacies to them are not subject to tax (*Matter of Huntington*, 168 N. Y. 399), unless there is some other provision of the Tax Law by which they are exempted. * * *

"(Page 262.) The legislative policy upon this subject, therefore, seems to be clearly defined and it is our plain duty to obey the legislative command, although in doing so, we cannot refrain from expressing our regret that the exemptions in our tax laws are not laid upon deeper and broader foundations. The spirit of philanthropy and charity will not be fostered or strengthened, nor the state enriched by a system of laws which permit an opulent sectarian church to gather into its coffers, tax free, the legacies of its donors, while the great humanitarian and practical charities of the age must first yield tribute to the state before they can take that which is given them to do their good works. It would almost seem as if restoration of the ancient law of charitable uses by chapter 701, Laws of 1893 (*Allen v. Stevens*, 161 N. Y. 122), had been overlooked in the subsequent codification of the statutes relating to taxable transfers, and it is to be hoped that the inequities and inconsistencies of the latter may soon give way to a more liberal and just rule."

Matter of Mergentine, 195 N. Y. 572, which affirmed, on opinion below, 129 App. Div. 367, contains discussion of amendments to statute re exemp-

tions under § 221. *Matter of Moses*, 138 App. Div. 525; *Matter of White*, 118 App. Div. 869-872; *Matter of McCormick*, 206 N. Y. 100-104; *Matter of Robinson*, 80 Misc. 458, appeal pending.

1902.

MATTER OF JAMES F. CORBETT, 171 N. Y. 516, affirms 55 App. Div. 124, which reverses 32 Misc. 120.

The Laws of 1896, chapter 908, applied in this case. The total estate was \$11,880.69, of which amount, under the Statute of Distributions, a brother and a sister were each entitled to one-third, while two nieces were entitled equally to the remaining third. Under the statute relating to taxable transfers a tax of 5% was imposed upon the share of each niece, which is not questioned. A tax of 1% was imposed upon each of the shares of the brother and sister, but this tax is challenged on this review upon the ground that the aggregate amount to which the brother and sister are entitled is less than the sum of \$10,000.

Held, that the tax was properly imposed. The court say, page 518: "To give a concrete illustration of the working of this feature of the statute as construed by this court: An estate of \$15,000, in which \$6,000 was given to a bishop or religious corporation, which are specifically exempted from taxation by the statute, and \$9,000 given to a brother and sister would not be taxable because the aggregate amount passing to persons not specifically exempted would not be of the value of \$10,000; but if only \$5,000 were given to the bishop or religious corporation and \$10,000 were given to the next of kin, whether in different classes or not, all would be taxed at the rate provided in the statute because the aggregate amount thus given is equal to the sum of \$10,000.

"This was the construction given to the section in *Matter of Hoffman* (143 N. Y. 327), in which the history of the development of the subject was carefully considered, Judge Finch writing, and the conclusions reached that the enactment of § 22, from which we have quoted, was undoubtedly due to the construction placed upon the statute by this court, and was obviously intended to compel the court to reach a different conclusion in some respects, notably, so far as it had been held that the aggregate amount of the estate should not be considered in determining whether a tax should be imposed, but instead

the specific share passing to the individual. In 1896 the sections of the Act of 1892 above referred to were reënacted as part of the Tax Law, section 2 becoming 221 of the latter act, and section 22 becoming section 242. The only change in either is the substitution of the word 'article' for 'act' in section 242."

Vide § 221a. *Matter of Costello*, 189 N. Y. 288; *Matter of Garland*, 88 App. Div. 380; *Matter of McMurray*, 96 App. Div. 128-130; *Matter of Fisher*, 96 App. Div. 133; *Matter of Mock*, 49 Misc. 283, reversed, 113 App. Div. 913; *Matter of Mason*, 69 Misc. 280-285, discussed in 1 State Department Reports, 559; *Matter of Jourdan*, 206 N. Y. 653; *Matter of Schwarz*, 209 N. Y. mem.

For discussion of rates of tax and exemptions under present statute vide page 43.

1902.

MATTER OF J. ALBERT MAHLSTEDT, 171 N. Y. 652, dismissed appeals from 67 App. Div. 176 and 69 App. Div. 620.

The Appellate Division, 69 App. Div. 620, granted the motion of the executors to amend its order, 67 App. Div. 176, so as to include the recital that "the decree of the Surrogate's Court of Westchester County, appealed from, is reversed on questions of fact and law." The state comptroller appealed from both the order reversing the Surrogate and the order amending the order by adding above recital. The Court of Appeals dismissed, without opinion, both appeals.

In this case decedent, who was ill, was assured by his physician that upon his recovery it would be necessary to take a long vacation. He thereupon assigned to his wife all the stock, except one share, which he had in a corporation of which he was President, and on same day made his will. He died on April 20, 1899, three weeks after making said assignment. The surrogate decided that the gift was one made in contemplation of death and taxable. By a divided court the Appellate Division reversed the surrogate, Justice Jenks dissenting with an opinion.

Vide *Matter of Thorne*, 162 N. Y. 238; *Matter of Brandreth*, 169 N. Y. 437-440; *Matter of Price*, 62 Misc. 149-151; *Matter of Baker*, 178 N. Y. 575; *Matter of Ahrens*, N. Y. Law Journal, May 14, 1913, opinion quoted sub *Contemplation of Death*, page 648.

1902.

MATTER OF MARY N. PETTIT, 171 N. Y. 654, affirms, on opinion below, 65 App. Div. 30.

Testatrix died a resident of New Jersey on March 19, 1892. She died seized of no real property in the State of New York, but left personal property valued at nearly \$1,000,000 in this state. Her will was admitted to probate in New Jersey, and no ancillary executors or administrators were ever appointed in the State of New York. Prior to May 1, 1892, \$6,000 of coupons were removed from the state, and some of the remaining personal property was removed during June and July, 1892, and the remainder in October, 1896.

The court say, page 32: "The question which is presented upon this appeal is whether the fact that assets of this estate were not removed to New Jersey until after May 1, 1892, rendered them liable to taxation under the Inheritance Tax Law (Laws of 1892, chapter 399) which became operative on that date. It had been held in the Matter of Embury (154 N. Y. 746), which affirmed a decision of the Appellate Division of the Supreme Court upon the opinion below (19 App. Div. 214) that where the property had been removed from the State prior to the passage of the act of 1892, the surrogate was without jurisdiction to impose a tax upon the bank stock and deposits in bank in New York city belonging to the estate of a non-resident decedent which the executors of his estate had removed from the State of New York in 1887, and had distributed. It is undoubtedly true that the court in its opinion stated that if the property was still in this State a different question would be presented. But it is difficult to conceive how the fact of non-removal by the executors of a non-resident decedent of property belonging to the decedent from this State, could make such property the subject of an inheritance tax which was imposed long after the transfer of the property had occurred. It is sought to maintain the right by subsequent legislation to tax the property of non-resident decedents remaining within the State upon the ground that it is not a tax upon the transfer of the property as is the inheritance tax in relation to the property of a resident decedent, but that the imposition of the tax is based upon its dominion over the property situated within its territory. If this rule can obtain in respect to persons who have died prior to the passage of the act, then there is no limit to the power of

the Legislature to enact a retroactive inheritance tax upon the property which may have belonged to a non-resident who has died and which has remained in the State, no matter how long anterior to the passage of the act such decease may have taken place. It is evident that no such retroactive legislation can be upheld or was intended. If the right of taxation because of decease does not exist at the time of death, it never can be thereafter imposed upon the ground of such death. If that would not be retroactive legislation, then it would be hard to define that term."

Held, that the surrogate was without jurisdiction.

Vide § 228. The jurisdictional defect re non-resident estates was remedied by chapter 399, Laws of 1892, in effect May 1, 1892. *Matter of Fitch*, 160 N. Y. 87; *Beers v. Glynn*, 211 U. S. 477, sustaining *Matter of Lord*, 186 N. Y. 549.

As to present law in non-resident estates vide *supra*, page 133.

1902.

MATTER OF TIMOTHY B. BLACKSTONE, 171 N. Y. 682,
affirms 69 App. Div. 127, on the ground that this case is
controlled by *Matter of Houdayer*, 150 N. Y. 37; sus-
tained in 188 U. S. 189, sub nom. *Blackstone v. Miller*.

Testator died a resident of Illinois, May 26, 1900. At the time of his death he had money on deposit with a New York trust company and also with private bankers in New York. *Held*, taxable.

Neither money nor deposits in banks of a non-resident decedent are taxable if transferred since the amendment by Laws of 1911, chapter 732, in effect July 21, 1911.

Vide subdivisions 2 and 4 of §§ 220 and 243. *Matter of Clinch*, 180 N. Y. 300; *Matter of Gordon*, 186 N. Y. 471; *Matter of Fearing*, 138 App. Div. 881-884, affirmed, with opinion, 200 N. Y. 340; *Matter of Tiffany*, 143 App. Div. 327-330, affirmed, on opinion of McLaughlin, J., below, 202 N. Y. 550; *Matter of Gibbes*, 84 App. Div. 510-513, affirmed, without opinion, 176 N. Y. 565; *Matter of Daly*, 100 App. Div. 373-376, affirmed, without opinion, 182 N. Y. 524; *Matter of Probst*, 40 Misc. 431; *Matter of Gibbs*, 60 Misc. 645-646; *Matter of Penfold*, 142 N. Y. Supp. 678-680; *Matter of Page*, N. Y. Law Journal, April 13, 1912, opinion quoted sub *Chose in Action*.

1902.

MATTER OF ELLEN E. GLENDINNING, 171 N. Y. 684,
affirms, without opinion, 68 App. Div. 125.

The testator was a non-resident. The court say, page 125: "The single question to be determined upon this appeal is whether a seat or membership in the New York Stock Exchange of a non-resident of this state is taxable under the law in relation to taxable transfers." *Held*, that it was subject to transfer tax.

Vide subdivision 2 of § 220 and § 243. Matter of Hellman, 174 N. Y. 254-256; Matter of Dusenbery, 2 State Department Reports, 501.

As to transfers in non-resident estates since 1911 amendment vide *supra*, page 133.

1902.

MATTER OF CORNELIUS VANDERBILT, 172 N. Y. 69.

Testator died a resident September 12, 1899. The court, divided four to three, Justice Haight saying (page 71) in the prevailing opinion: "Prior to an amendment of 1899 the Transfer Tax Law (L. 1896, ch. 908, section 230, as amended L. 1897, ch. 284), provided that 'Estates in expectancy which are contingent or defeasible shall be appraised at their full, undiminished value when the persons entitled thereto shall come into the beneficial enjoyment or possession thereof. * * *' Under this statute it has repeatedly been held that future contingent estates were not taxable until they vested in possession and the beneficial owner could be ascertained. The question now presented is as to whether this statute has been changed. The legislature, by chapter 76 of the Laws of 1899, amended section 230 of the Tax Laws, known as chapter 908 of the Laws of 1896, by which the provision of the statute quoted is omitted and in place thereof we have the following: 'Whenever a transfer of property is made, upon which there is, or in any contingency there may be, a tax imposed, such property shall be appraised at its clear market value immediately upon such transfer, or as soon thereafter as practicable.' Then follow provisions particularly specifying the manner in which the value of future or limited estates shall be determined. Then it is provided that 'When property is transferred in trust or otherwise, and the rights, interests or estates of the transferees are dependent upon contingencies or conditions whereby they may be wholly or in

part created, defeated, extended or abridged, a tax shall be imposed upon said transfer at the highest rate which, on the happening of any of the said contingencies or conditions, would be possible under the provisions of this article, and such tax so imposed shall be due and payable forthwith, *out of the property transferred.*'

"It seems to me clear that the legislature by this amendment intended to change the law upon the subject and to make the transfer tax upon property transferred in trust payable forthwith. The tax is not required to be paid by the conditional transferee, for, by the provisions of the statute, it is to be paid 'out of the property transferred.' So that whoever may ultimately take the property takes that which remains after the payment of the tax. This amendment makes provision for property transferred in trust. It, therefore, contemplates defeasible transfers as well as absolute transfers.

"By the seventeenth clause of the will of the testator the residue and remainder of his estate was given in trust to his executors for the benefit of his son Alfred G. Vanderbilt, which trust is to continue until he becomes thirty years of age, at which time one-half of the trust estate is to be turned over to him, and as to the balance, the trust is to continue until he becomes thirty-five, when the remainder is to become his absolutely. The will also contains a provision that in case he dies before becoming thirty or thirty-five the estate shall be given to other persons. The only contingency, therefore, that can happen to defeat his taking the estate in possession is his death before the period fixed for the transfer of the possession of the property to him. The estate created, therefore, is an estate in trust for the periods mentioned, with a remainder vested in Alfred G., subject to be defeated by his death before arriving at the age of thirty or thirty-five. (Matter of Seaman, 147 N. Y. 72; Campbell v. Stokes, 142 N. Y. 23; Manice v. Manice, 43 N. Y. 370; Warner v. Durant, 76 N. Y. 133; 2 Washburn on Real Property, 629.)

"Under the view taken by me of this statute, the transfer tax still remains a tax upon succession. Each trust estate created is to be separately appraised and the tax determined according to the percentage fixed by the statute for those who are contingently entitled to the estate; and when fixed, the tax is forthwith payable out of the trust estate."

Vide sixth paragraph of §§ 230 and 241, and footnote, *post*, page 273, to Matter of Brez, 172 N. Y. 609. Vide § 222, and for exceptions to rule that

transfers presently taxable, vide *Matter of Zefita*, 167 N. Y. 280; *Matter of Howe*, 86 App. Div. 286-290, affirmed, on opinion below, 176 N. Y. 570; *Matter of Babcock*, 81 App. Div. 645, affirming 37 Misc. 445; *Matter of Granfield*, 79 Misc. 374; and *Matter of Burgess*, 204 N. Y. 265-269; *Matter of Gans*, N. Y. Law Journal, April 13, 1912, opinion quoted *post*, page 862.

Vide etiam *Matter of Guggenheim*, 189 N. Y. 561; *Matter of Keeney*, 194 N. Y. 281-285; *Matter of Huber*, 86 App. Div. 458-461; *Matter of Tracy*, 179 N. Y. 501-509; *Matter of Kennedy*, 93 App. Div. 27; *Matter of Smith*, 150 App. Div. 805-810; *Matter of Title Guarantee & Trust Co.*, 81 Misc. 106-112; *Matter of Ames*, 141 N. Y. Supp. 793-796; *Matter of Dwight*, N. Y. Law Journal, October 8, 1911, affirmed, without opinion, 149 App. Div. 912, opinion quoted sub *Trust Deed*, page 872; *Matter of Bass*, 57 Misc. 531-533.

1902.

MATTER OF GEORGE JONES, 172 N. Y. 575, reverses 69 App. Div. 237, and affirms 28 Misc. 356.

Testator died August 12, 1891. He owned forty-six of the one hundred shares of the stock of "The New York Times," a joint-stock association. The comptroller claimed that these shares were personal property and taxable as shares of stock in an ordinary corporation; the executors contended that as the joint-stock association owned real estate, that the interest therein of the shareholder was realty also, and as it passed under his will in the direct line was exempt, the statute at that time taxing transfers of realty only when passing to collaterals or strangers.¹ A question also arose as to whether the value of the good will in this association in the "Times" newspaper was property which passed under the will of testator and was taxable.²

Held, that the shares were personal property, and that the good will of the newspaper was properly included as part of the assets of the association.

The widow, who was a life tenant, died intermediate the death of the decedent and the transfer tax appraisal. The appraiser calculated the value of the widow's interest, as measured by the term of its actual duration.³ *Held*, (28 Misc. 356-357) that this was not correct and that its value should be determined by the superintendent of insurance in accordance with the provisions of that portion of act of 1887 relating to life estates.

Transfers of realty, when passing in the direct line, were first taxed by Laws of 1903, chapter 41, in effect March 16, 1903; vide § 220.

Vide *Matter of Wilmer*, 153 App. Div. 804, as to joint-stock associations in estate of non-resident prior to 1911 amendment.

¹ Matter of Tiffany, 143 App. Div. 327-328, affirmed, on opinion of McLaughlin, J., below, 202 N. Y. 550, appeal pending in United States Supreme Court.

² As to valuation of inactive stock vide cases quoted sub Closely Held Stock.

³ As to valuation of life estates vide Matter of White, 208 N. Y. 64; Matter of Hall, 36 Misc. 618-619.

As to good will vide Matter of R. G. Dun, 40 Misc. 509-510; Matter of Keahon, 60 Misc. 508, and cases cited sub Good Will.

1902.

MATTER OF JOSEPHINE L. NEWCOMB, 172 N. Y. 608,
affirms, on opinion below, 71 App. Div. 606.

Testatrix died a resident of Louisiana, April 8, 1901. She owned stock in a New York corporation, the certificate of stock, however, was in name of another and had passed to her by an endorsement in blank on the back of the certificate. *Held*, taxable.

Vide subdivision 2 of §§ 220 and 243. Stock held by a non-resident decedent not taxable if transferred since the amendment by Laws of 1911, chapter 732, in effect July 21, 1911.

1902.

MATTER OF JOHN D. BREZ, 172 N. Y. 609.

Testator died November 18, 1899. The court say, page 610: "We are of opinion that all the questions presented on this appeal, including both the construction and the constitutionality of the statute of 1899 (chapter 76) providing for the present appraisal and taxation of remainders created by will upon contingencies or where the ultimate beneficiaries cannot be immediately ascertained, are disposed of by our recent decision in Matter of Vanderbilt (172 N. Y. 69), and the order appealed from must, therefore, be reversed on the authority of that case.

"We feel, however, justified in calling the attention of the legislature to an inequality caused by the statute, which may have escaped its notice and which we submit to its wisdom whether it would not be proper to remedy.¹ In all the cases covered by this statute there must be one or more intermediate estates, generally life estates, during the period elapsing between the death of the testator and the happening of the contingency

(commonly the death of the life tenant) on which the remainders become vested absolutely and the remaindermen become certain. The tax on the remainders being paid out of the corpus of the estate diminishes the income of the life tenant by the interest on the amount of the tax. The constitutionality of this provision, though it affects the life tenant, we have upheld because the rate or amount of tax on the succession of the life tenant is within the discretion of the legislature to prescribe, and the scheme in effect is simply the imposition of an additional tax on the life tenant. It is evident, however, that the legislature has determined that in many instances the tax may be excessive; for while it directs that the tax shall be imposed at the highest rate for any possible succession that may occur in any contingency, it provides that if it eventually transpires that the succession which actually happens is subject to a lower rate, the excess of tax, with interest, shall be repaid by the state.

"The interest on this excess ought fairly to go to the life tenant, though the statute is silent on the subject. But even if given to the life tenant it can be repaid to his estate only after his death, for it is commonly his death that finally settles the rate of tax. This is hardly an equivalent for the diminution of his income during life, an income oftentimes necessary for his support. It seems to us that, bearing in mind the general character of the tax and that the legislature has deemed it right to prescribe different rates of taxation depending on the relation of the legatee or devisee to the deceased, if it is desired to make taxes on remainders payable immediately, it would be fairer to the life tenant to have the tax assessed at the lowest rate of any succession provided for by the will, and in case the remainder eventually vesting should prove taxable at a higher rate, then such increased tax should be payable at the time of its enjoyment.

"Nor would this change be detrimental to the state. Our experience informs us that in the majority of cases the remainders are first appointed to the issue of the life tenant and descendants of the testator and are given to collaterals or strangers only in default of issue. The lowest rate of tax thus usually proves the final rate. Where the state imposes in the first instance a higher rate of tax it becomes obligated to repay the excess after a lifetime with six per cent interest, while it could borrow the money at half that rate."

Vide dissenting opinion, page 612; etiam dicta in *Matter of Hoffman*, 143 N. Y. 327-334; *Matter of Guggenheim*, 189 N. Y. 561; *Matter of*

Huber, 86 App. Div. 458-461; Matter of Howe, 86 App. Div. 286-290, affirmed, on opinion below, 176 N. Y. 570; Matter of Smith, 150 App. Div. 805-810.

¹ Not until 1911 did the legislature in any way attempt to remedy the "inequality caused by the statute." By chapter 800, Laws of 1911, in effect July 28, 1911, it added to § 241 what now form the last two paragraphs of said section. By the same act is amended the sixth paragraph of § 230 by providing that a temporary order shall be entered. Vide the three opinions of the state comptroller, dated respectively February 10, 11 and 14, 1913, published in 1 State Department Reports, 566-569, opinions quoted *post*, page 827, page 828 and page 725; and opinion of state comptroller, dated June 5, 1913, 3 State Department Reports, 450, opinion quoted *post*, page 824.

As to when temporary order should not be entered vide opinion of state comptroller, dated May 19, 1913, 2 State Department Reports, 503, opinion quoted *post*, page 825.

1902.

MATTER OF HENRY W. KING, 172 N. Y. 616, affirms, on opinion below, 71 App. Div. 581, which reversed 30 Misc. 575.

Testator died a resident of Illinois April 12, 1899, and was a member of a clothing firm doing business in both New York and Chicago. The New York branch was mainly occupied in manufacturing and thereby incurred large debts; the Chicago branch mainly sold and distributed the manufactured products and thereby made collections in excess of outlays. As a result the debts owing to New York creditors exceeded the value of the New York assets, and it is claimed that these debts should be deducted and that nothing will remain subject to tax.

The court say, page 582: "However desirous we may be to give a liberal construction in order to uphold a levy under the Transfer Tax Act (Laws of 1896, chap. 908, art. 10, as amd.), we think there is an insuperable objection to sustaining the tax fixed in this proceeding. Ordinarily on the death of a member of a firm the legal title to the assets of the firm vests in the surviving members, and what is left to the representatives of the deceased partner is the right to an accounting. (Williams v. Whedon, 109 N. Y. 333.) Assuming, however, but not deciding, that the decedent had a property interest in the assets of the firm in this State which is subject to taxation, we find it impossible to get away from the conclusion that as against such property the right exists to deduct the debts due to creditors in this State.

"In the present instance, upon the conceded facts, this would leave no balance subject to taxation. A tax on personal property of a non-resident is one which the State imposes based upon its dominion over the property situated within its territory; and as such property is liable to be appropriated for the payment of debts therein, we fail to see upon what principle the latter can be entirely disregarded. Here it is conceded that the liabilities of the firm in this State exhaust its assets in this State. * * *

"(Page 583.) Our conclusion, therefore, is, that as the debts in this State exhausted the value of the property here, no tax could be imposed."

Vide subdivision 2 of §§ 220 and 243; etiam *Matter of Porter*, 67 Misc. 19, affirmed, without opinion, 148 App. Div. 896; *Matter of Grosvenor*, 193 N. Y. 652; *Matter of Browne*, 195 N. Y. 522; *Matter of Clark*, N. Y. Law Journal, February 9, 1912, opinion quoted sub *Partnership*; *Matter of Dusenberry*, 2 State Department Reports, 501, opinion quoted, page 119.

As to pledged securities vide *Matter of Pullman*, 46 App. Div. 574; *Matter of Ames*, 141 N. Y. Supp. 793.

1902.

MATTER OF JOHN L. ROGERS, 172 N. Y. 617, affirms, on opinion below, 71 App. Div. 461.

Testator died December 2, 1869. By his will he gave a life estate to his widow, with power to dispose of remainder by her will. The widow died April 30, 1900, leaving a will. After directing her executors to pay all her debts, including a loan of \$15,000, secured by her bond, she appointed all the residue of the fund so left by her husband and over which she had power of appointment, to her brother, the appellant Wilmer S. Wood absolutely.

The appraiser taxed the transfer to widow's brother at five per centum upon the theory that he was a stranger in blood to John L. Rogers.

The court say, page 464: "The Laws of 1896, as amended by chapter 284 of the Laws of 1897, provide: 'Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property made either before or after the passage of this act, such appointment when made shall be deemed a transfer taxable under the provisions of this act in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power,

and had been bequeathed or devised by such donee by will.' This provision of law was before this court in *Matter of Seaver* (63 App. Div. 283), and it was there held that section 220 expressly declares that it is the exercise and not the creation of the power of appointment which effects the transfer upon which the tax is enforced."¹

Held, that the fund must, for taxing purposes, be held to pass from sister to brother, and the tax was fixed at one per centum.

As to the direction contained in the will of the donee of the power of appointment to repay the loan heretofore made to her and for which she had given her bond, out of the fund over which she exercises such power, the court say, page 465: "The creditors of Virginia B. Rogers are not obliged to accept this provision of the will for the payment of their debt; but, if they do accept it, we are unable to discover any way by which they may avoid the payment of the tax which the State imposes as a condition of receiving a transfer under the will of the deceased. This is clearly the doctrine of *Matter of Gould*, 156 N. Y. 423, and is not inconsistent with *Matter of Westurn*, 152 N. Y. 93."²

Vide subdivision 6 of § 220. *Matter of Wolfe*, 89 App. Div. 349-353, affirmed, without opinion, 179 N. Y. 599; *Matter of Daniell*, 40 Misc. 329-331.

¹ *Matter of Walworth*, 66 App. Div. 171-175.

² *Matter of Eaton*, 55 Misc. 472-477.

1902.

MATTER OF FRANCES L. BUSHNELL, 172 N. Y. 649,
affirms, without opinion, 73 App. Div. 325.

Testatrix, a resident of Connecticut, died on July 25, 1899, the owner of stock in New York corporations. The will provided (page 326): "(1) I give to my mother, Mary A. Bushnell, the use for her life of all my property, with power to reinvest the same. (2) After her use of my property shall have ceased, I leave it all excepting my personal effects, to my niece, Emily Cheney * * * to be hers and her heirs forever."

The executrices both resided in Connecticut, and the certificates of stock were in the possession of the testatrix without the State at the time of her death. It was contended by the niece that she had no vested interest in the property, and may

never have, for the reason that the corpus may be used or lost by the life tenant, and that the property is not within this State.

Held, that the transfer of the stock in the New York corporations was taxable, the court saying (page 328) that the niece, "Emily Cheney Learned, took a vested indefeasible interest in this property at the time of the death of the testatrix. There has, therefore, been a transfer to her within the contemplation of the Transfer Tax Law and the interest thus transferred was then taxable. (Matter of Dows, 167 N. Y. 227.)

"Both the life tenant and remainderman took their respective interests in the property as a matter of sovereign favor. Neither is the life tenant in a position to complain that the principal of which she is entitled to the use is diminished by the tax nor can the remainderman resist the imposition of the tax upon the ground that he may never come into possession of the property. The law affords remedies to protect the rights of remaindermen. The theory of the statute is that the tax is to be paid by the executors out of the property transferred (Transfer Tax Law, sections 222, 224), and the statute would not be construed as making the transferee liable personally beyond the amount of the property coming into his hands."

Vide §§ 222, 224 and 230. Matter of Merritt, 155 App. Div. 228-232.

Stock held by a non-resident decedent is not taxable if transferred since the amendment by Laws of 1911, chapter 732, in effect July 21, 1911; subdivision 2 of § 220 and § 243.

For present law in non-resident estates vide *supra*, page 133.

1903.

MATTER OF THEODORE HELLMAN, 174 N. Y. 254.

Testator died a resident October 9, 1901. The question presented by this appeal is whether a seat in the New York Stock Exchange, of which the deceased died the owner, is subject to the inheritance or transfer tax prescribed by article 10 of the Tax Law.

The court say, page 256: "Prior to the enactment of the Tax Law (chapter 908, Laws of 1896) the legislation which imposed ordinary annual taxes and that which exacted a tax on the devolution of property by will or intestacy were entirely distinct. The first, in one form or other, had existed from the formation of the government. The latter was of comparatively recent origin. It was settled that under the law as it stood

prior to the act of 1896 a seat in the exchange was subject to the inheritance or transfer tax (*Matter of Glendinning*, 68 App. Div. 125; affirmed, 171 N. Y. 684); but it has also been held that it could not be assessed for annual taxation. (*People ex rel. Lemmon v. Feitner*, 167 N. Y. 1.)

"The difficulty in the present case has been occasioned by the revision of the law and the consolidation of the previous legislation into a single statute, the Tax Law of 1896. In subdivision 5 of section 2 of the statute is given the definition of personal property as used in the chapter or act. It is a reproduction of the provisions of law then in force regulating general taxation. Article 10 deals with 'taxable transfers' or inheritance tax. By section 220 of the statute (the first section of the article) it is enacted that a certain tax shall be imposed on the transfer of any real or personal property under circumstances therein enumerated. The majority of the court below were of opinion that the definition of personal property already mentioned controlled the provisions of this article and that as the definition did not, under the decisions of this court, include a seat in the exchange, the seat was not subject to the transfer tax.

"If the statutory scheme of taxation were an original one and the provisions quoted were the only ones which referred to the subject-matter, the argument of the learned Appellate Division would be cogent and probably conclusive. But by a subsequent section of the article on taxable transfers (section 242) new definitions are given applicable to the transfer tax alone: 'The words 'estate' and 'property,' as used in this article, * * * shall include all property or interest therein, whether situated within or without this State.' That a seat in the exchange is property and passes to a receiver or to an assignee in bankruptcy has been authoritatively determined by the decisions of both this court and the Supreme Court of the United States. (*Powell v. Waldron*, 89 N. Y. 328; *Platt v. Jones*, 96 N. Y. 24; *Hyde v. Woods*, 94 U. S. 524; *Page v. Edmunds*, 187 U. S. 596.) In the *Lemmon* case, we did not question this proposition, but our decision proceeded on the ground that the seat did not fall within what Judge Vann termed 'the somewhat restricted definition of the tax laws.'

"In determining the construction to be given to the broad and comprehensive language of section 242, we must consider that the statute has a history plainly indicating the trend of legislative action and that as to the transfer tax it is a literal reproduc-

tion of the then existing law. First enacted in 1885 (Chap. 483) the Inheritance Tax Law was limited to property passing to collateral relatives. It was subjected to repeated amendments, the effect of which in nearly every instance was either to enlarge the class of persons subject to the tax or to extend its application to some species of property which the courts had held not to fall within its terms. The distinction between property justly subject to ordinary taxation and that liable to the imposition of the transfer tax was early appreciated."

Held, that a seat in the New York Stock Exchange was subject to the transfer tax.

Vide § 243. *Matter of Daly*, 100 App. Div. 373-379, affirmed, without opinion, 182 N. Y. 524; *Matter of Curtis*, 31 Misc. 83; *Matter of R. G. Dun*, 40 id. 509-510.

1903.

MATTER OF WILLIAM SCRIMGEOUR, 175 N. Y. 507, affirms, per curiam, 80 App. Div. 388, which affirms 39 Misc. 128.

The decree fixing the tax was made pursuant to chapter 76 of the Laws of 1899 (amdg. Laws of 1896, chap. 908, § 230), and that chapter was declared unconstitutional in *Matter of Pell* (171 N. Y. 48). After the decision in *Matter of Pell*, and after the time to appeal from the decree had expired, the petitioners in this proceeding applied for an order vacating the taxing decree, adjudging the estate exempt from transfer tax and directing the Comptroller to refund the moneys paid under the decree. An order was made granting petitioners' prayer and the Comptroller appeals.

Held, (page 389 of 80 App. Div.) that the language of the 6th subdivision of § 2481 of the Code of Civil Procedure, together with that of § 229 of the Tax Law (Laws of 1896, chapter 908, as amended by Laws of 1901, chapter 173), is broad enough to confer upon him complete jurisdiction to vacate a void order of his court.

The court say, page 507: "Both parties mistakenly supposed that the estate was, under the law, subject to a transfer tax. The proposition was not litigated nor decided but assumed. We think it was within the power of the surrogate, on an application to his discretion and favor, to open the case, relieve the respond-

ents from the consequence of their mistake, and set aside the order which had been erroneously made."

Vide §§ 225 and 228. *Matter of Backhouse*, 110 App. Div. 737-739, affirmed, without opinion, 185 N. Y. 544; *Matter of O'Berry*, 179 N. Y. 285-288; *Matter of Hoople*, 179 N. Y. 308; *Matter of Willets*, 119 App. Div. 119-125, affirmed, without opinion, 190 N. Y. 527; *Matter of Townsend*, 153 App. Div. 85-87, appeal pending; *Matter of Weiler*, 122 N. Y. Supp. 608, affirmed, without opinion, 139 App. Div. 905; *Matter of Scott*, 208 N. Y. 602; and cases cited sub *Vacating Decree*. Vide etiam *Matter of Niven*, 29 Misc. 550.

1903.

MATTER OF BENJAMIN D. SILLIMAN, 175 N. Y. 513,
affirms, without opinion, 79 App. Div. 98, which reversed
38 Misc. 226.

The court say, page 98: "This was an application to modify a decree of the Surrogate's Court of Kings county fixing the transfer tax upon the estate of Benjamin D. Silliman, deceased. In 1901 the executors and trustees under the will paid to the Comptroller of the State of New York \$51,456.71, being the amount of the transfer tax as previously assessed under a decree and modified decree of the Surrogate's Court. In the present proceeding the executors and trustees sought a modification of the previous decrees on two grounds: (1) That subsequently to the payment of the tax the personal property of the estate had been increased by the conversion of certain real property which had been sold under a power of sale contained in the will, the effect of such sale being to entitle the executors to an increase of \$1,500 in the amount of their commissions, and (2) that in assessing the amount of the transfer tax no deduction had ever been made for the commissions upon the real and personal property of the deceased to which the appellants were entitled as trustees under the will, the tax on such commissions amounting to the sum of \$1,072.74. * * * (Page 99.) That the Surrogate's Court possessed the power to make the modification which was sought in this proceeding. Since the payment of the transfer tax upon this estate, the Court of Appeals has decided that the amount represented by the expense of administration never passes to the legatees or next of kin, and is, therefore, not subject to the transfer tax. (*Matter of Gihon*, 169 N. Y. 443.) * * * It would seem, therefore, that the previous assessment of the tax so far as it included such commissions was without jurisdiction,

and that the Surrogate's Court possessed power to modify its prior decree so as to exclude such commissions from consideration as any part of the sum upon which the tax was to be assessed. * * * (Page 100.) So far as the conversion of a portion of the testator's real property into personal estate is concerned, it distinctly appears that such conversion took place over six months after the payment of the tax, so that the relief sought on that ground could not possibly have been obtained by appeal.

"The order refusing the desired modification should be reversed and the case remitted to the Surrogate's Court for proceedings in accordance with this opinion."

Vide § 228. Matter of Willets, 119 App. Div. 119-123, affirmed, without opinion, 190 N. Y. 527; Matter of Townsend, 153 App. Div. 85-87, appeal pending; Matter of Connelly, 38 Misc. 466; Matter of Weiler, 122 N. Y. Supp. 608; affirmed, without opinion, 139 App. Div. 905, and cases cited sub Vacating Decree.

1903.

MATTER OF LAURA ASTOR DELANO, 176 N. Y. 486 (same case, without opinion, in 183 N. Y. 543), sustained in 205 U. S. 466, sub nom. Chanler v. Kelsey.

The Court of Appeals say, page 489: "On the 30th of September, 1848, William B. Astor owned a house and lot on Lafayette Place, in the city of New York, and on that day he conveyed the same to his daughter, Mrs. Laura Delano, for life, and upon her death, without issue, to her brothers and her sister Alida, or their issue as they might then survive, *per stirpes*."

"By the same deed he conferred upon Mrs. Delano a power of appointment, to be exercised, in her discretion, by an instrument, 'in its nature testamentary,' in such a manner as 'to give the said land and premises, or any share or part thereof, to and amongst her said * * * brothers and sister Alida, or their issue, in such manner and proportions as she may appoint.'"

"On the 6th of September, 1849, said William B. Astor transferred certificates of the public debt of the state of Ohio, amounting to \$50,000, to James Gallatin and another, in trust to receive the income and apply it to the use of his daughter Laura during her life, and upon her death without issue, to transfer 'the capital of the said stock * * * to her surviving brothers and sister Alida' or their issue then surviving. This gift was also

subject to a power of appointment created by the trust deed, whereby the said Laura was authorized 'by any instrument duly executed as a will of personal estate to dispose of said capital into and amongst her * * * brothers, sister and their issue in such shares and proportions as she may think fit and upon such limitations, by way of trust or otherwise, as in her discretion may be lawfully devised.' William B. Astor died on the 24th of November, 1875, about twenty-six years after the date of the last deed, and neither of said instruments was made by him in contemplation of death. Mrs. Delano, his daughter, died June 15, 1902, without issue leaving a last will and testament, which has been duly admitted to probate, whereby she exercised the power of appointment contained in said deeds in favor of Arthur Astor Carey, her nephew."

The Court of Appeals, by a divided court, held that the exercise of the power of appointment was taxable on the ground that the statute did (page 491) "not attempt to impose a tax upon property, but upon the exercise of a power of appointment."

The United States Supreme Court say, page 472: "The tax in controversy was imposed under an amendment of the general transfer-tax law of the State of New York, chapter 284, Laws of 1897, which provides as follows:

"Whenever any person or corporation shall exercise the power of appointment derived from any disposition of property made either before or after the passage of this act, such appointment when made shall be deemed a transfer, taxable under the provisions of this act, in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will. * * *

"The validity of this tax was attacked in the courts of New York upon objections pertaining to both the Federal and state constitutions. The latter are not open here, and we shall consider the case only so far as it relates to the objections made to the validity of this statute by reason of alleged violations of the Federal constitution. These are: First, that by the imposition of the tax the property of the beneficiaries is taken without due process of law, in violation of the Fourteenth Amendment; and, second, that such taxation violates the obligation of a contract within the protection of section 10 of Article 1 of the Federal Constitution.

"The objection that the property is taken without due process

of law is based upon the argument that the estate in remainder was derived from the deeds of William B. Astor and not under the power of appointment received from those deeds by Mrs. Laura A. Delano. * * * However technically correct it may be to say that the estate came from the donor and not from the donee of the power, it is self-evident that it was only upon the exercise of the power that the estate in the plaintiffs in error became complete. Without the exercise of the power of appointment the estates in remainder would have gone to all in the class named in the deeds of William B. Astor. By the exercise of this power some were divested of their estates and the same were vested in others. It may be that the donee had no interest in the estate as owner, but it took her act of appointment to finally transfer the estate to some of the class and take it from others. * * * The exercise of the power bestowing property in the present case was made by will. And we need not consider the case, expressly reserved by the Court of Appeals in its opinion, as to the result if it had been exercised by deed. * * * As in *Orr v. Gilman*, 183 U. S. 278, we must accept this decision of the New York Court of Appeals holding that it is the exercise of the power which is the essential thing to transfer the estates upon which the tax is imposed. That power was exercised under the will of Laura Delano, a right which was conferred upon her under the Laws of the State of New York and for the exercise of which the statute was competent to impose the tax in the exercise of the sovereign power of the legislature over the right to make a disposition of property by will. *United States v. Perkins*, 163 U. S. 625-628; *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283-288.

"We cannot say that property has been taken without due process of law within the protection of The Fourteenth Amendment, by the manner in which The Court of Appeals has construed and enforced this statute.

"Nor do we perceive that the effect has been to violate any contract right of the parties. It is said that this is so, because instead of disposing of the entire estate, ninety-five per cent of the property included in the power has been transferred and five per cent taken by the State; but as there was a valid exercise of the taxing power of the State, we think the imposition of such a tax violated no contract because it resulted in the reduction of the estate.

"Certainly the remaindermen had no contract with the donor

or with the State. For whether the remaindermen received aliquot parts of the estate or the same was divested in whole or in part for the benefit of others in the class, depended upon the exercise of the power by the donee. The State was not deprived of its sovereign right to exercise the taxing power upon the making of a will in the future by which the estate was given to the appointees."

Vide subdivision 6 of § 220. *Matter of Lansing*, 182 N. Y. 238-247; *Matter of Kidd*, 188 N. Y. 274-279; *Matter of Fearing*, 200 N. Y. 340-344; *Isham v. N. Y. Assn. for Poor*, 177 N. Y. 218-223; *Matter of Buckingham*, 106 App. Div. 13-19; *Matter of Smith*, 150 App. Div. 805-809-812; *Matter of Warren*, 62 Misc. 444-447; *Matter of Kissel*, 65 Misc. 443-444, affirmed, without opinion, 142 App. Div. 934; *People ex rel. Ripley v. Williams*, 69 Misc. 402-406; *Matter of Smith*, 80 Misc. 140-144; *Matter of Frazier*, N. Y. Law Journal, March 28, 1912, opinion quoted sub *Power of Appointment*, page 778.

1903.

MATTER OF JAMES S. GIBBES, 176 N. Y. 565, affirms, without opinion, 84 App. Div. 510, which reversed 40 Misc. 581.

Testator died a resident of South Carolina, April 26, 1888, leaving an estate of over \$700,000, of which \$300,000 was invested in bonds of corporations foreign to the State of New York, which were on deposit at the time of his death with the Bank of New York in the city of New York. He left a last will and testament which was admitted to probate in South Carolina. The testator devised his property in trust with life estates to his two sons and grandchild and remainders to their respective issue, or, in the event of the death of all lineal descendants, to certain individuals and corporations. On the 18th day of May, 1899, the testator's son James, his last surviving descendant, died and the remainders vested in the individuals and corporations as provided for in the will in that contingency. All of the beneficiaries were non-residents.

The court say, page 511: "This property having been left in trust and it being uncertain whether it was transferred to persons or corporations liable for the collateral inheritance tax, its appraisal was postponed until the happening of the contingency which resolved the uncertainty.¹ The sole question presented by the appeal is whether these bonds of foreign corporations left on deposit with the bank in this State at the time

of the testator's death, he being a non-resident, and transferred by his will or by statutes of distribution to non-residents are taxable under the provisions of the Collateral Inheritance Tax Law, so called. * * * (Page 513.) We are of opinion that neither under the amendatory act of 1887 any more than under the original act of 1885, are such bonds property left within this State and subject to the payment of the collateral inheritance tax."

Vide subdivision 2 of § 220. As to bonds in non-resident estates subsequent to 1892 amendment and prior to 1911 amendment vide *Matter of Whiting*, 150 N. Y. 27; *Matter of Morgan*, 150 id. 35; *Matter of Fearing*, 200 N. Y. 340; *Matter of Preston*, 75 App. Div. 250. As to U. S. bonds vide *Matter of Schermerhorn*, 50 Misc. 233; *Matter of Plummer*, 161 N. Y. 631, sustained in 178 U. S. 115, *sub nom.* *Plummer v. Coler*.

As to transfers in non-resident estates since 1911 amendment, vide *supra*, page 133.

¹ *Matter of Vanderbilt*, 172 N. Y. 69; and footnote, *supra*, page 273, to *Matter of Brez*, 172 N. Y. 609, as to practice since 1899 amendment.

1903.

MATTER OF ELIZABETH L. HOWE, 176 N. Y. 570, affirms,
on opinion below, 86 App. Div. 286.

Testatrix created a trust for life, with power of appointment to the life tenant. The surrogate decided that the remainder was not taxable until the time comes for the exercise of the testamentary power of appointment conferred upon the life beneficiaries. The comptroller contended that the remainder was presently taxable by virtue of chapter 76 of the Laws of 1899, which amended § 230 of the Tax Law (Laws of 1896, chapter 908) by inserting therein, among other provisions, the following: "When property is transferred in trust or otherwise, and the rights, interest or estates of transferees are dependent upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended or abridged, a tax shall be imposed upon said transfer at the highest rate which, on the happening of any of the said contingencies or conditions, would be possible under the provisions of this article, and such tax so imposed shall be due and payable forthwith out of the property transferred." The court say, page 289: "The phraseology of this amendment of 1899 is not such as necessarily to embrace a case like the present, where a testamentary power of appoint-

ment is bestowed upon the life beneficiary of a trust. * * * It is to be observed that the amendatory statute (Laws of 1899, chap. 76) makes no change whatever in any section of the Tax Law, except section 230. * * * (Page 290.) Neither *Matter of Vanderbilt* (172 N. Y. 69) nor *Matter of Brez* (id. 609) bears upon the question in controversy here. Those decisions relate wholly to the effect of section 230 of the Tax Law (as amended by Laws of 1899, chap. 76), and the opinions contain nothing in conflict with the views which have been expressed."

The decree of the surrogate's court was affirmed.

Vide subdivision 6 of § 220 and sixth paragraph of § 230. *Matter of Burgess*, 204 N. Y. 265-269; *Matter of Buckingham*, 106 App. Div. 13-20; *Matter of Clarke*, 39 Misc. 73, and *Matter of LeBrun*, 39 id. 516, decided before the *Howe* case, are of interest as showing the doubt of the courts on the question; *Matter of Field*, 36 Misc. 279; *Matter of Kissel*, 65 Misc. 443-444, affirmed, without opinion, 142 App. Div. 934; *Matter of Granfield*, 79 Misc. 374; *Matter of Smith*, 80 Misc. 140-144; *Matter of Stuart*, N. Y. Law Journal, May 10, 1913, opinion quoted sub *Power of Appointment*, page 772; *Matter of Lane*, 157 App. Div. 694-697; *Matter of Turner*, 82 Misc. 25-26.

1904.

WILLIAM B. ISHAM ET AL. AS EXECUTORS, ETC., v. N. Y. ASSN. FOR IMPROVING CONDITION OF THE POOR, 177 N. Y. 218.

This was a submission of a controversy to the Appellate Division under § 1279 of the Code of Civil Procedure. The question submitted was whether certain transfer taxes upon a fund of \$500,000 are to be paid by the recipients of that fund or out of the residuary estate of Mary J. Walker, deceased, the plaintiffs' testatrix. By the will of John Watson, the father of testatrix, she was given a power of appointment of a fund of \$500,000 which was in the hands of trustees who were to pay her the income thereof during her life, "and to pay over the principal as the said Mary J. Walker might by will direct." By her will, Mrs. Walker provided in the 1st clause as follows: "I give and bequeath the trust fund of five hundred thousand dollars now held for my benefit to [sic] Ambrose K. Ely, as trustee under the last will and testament of my father, the late John Watson, over which trust fund I have a power of disposition by will, as follows, to wit:" She then proceeds to dispose of the whole principal sum among some twelve charitable or benevolent insti-

tutions in the city of New York, all of which are capable of taking by bequest. After the provisions of the will concerning the disposition of the trust fund of five hundred thousand dollars the testatrix proceeds to make many specific gifts directly or in trust of large sums of money, using as to each the same phrase, "I give and bequeath," as in the 1st clause. In the 23d clause she provides as follows: "I direct and authorize my executors hereinafter named to pay out of my residuary estate any and all transfer or inheritance taxes that may be imposed or become due upon any of the legacies hereinbefore made, whether such taxes be State or Federal."¹

It is claimed on the part of the recipients of the trust fund that this 23d clause applies to the provisions of the will under which they take, while the plaintiffs, on the other hand, contend that the operation of the 23d clause is limited strictly to such legacies as are given by the testatrix payable out of her own individual estate.

Held, that the transfer taxes should be paid by the executors of Mary J. Walker out of her residuary estate.

Vide § 224.

¹ *Jackson v. Tailer*, 41 Misc. 36, affirmed, without opinion, 184 N. Y. 603; *Matter of Smith*, 80 Misc. 140-143; *Matter of Samuel Myers*, N. Y. Law Journal, November 22, 1913, opinion quoted *supra*, page 759.

1904.

MATTER OF MARIA F. MILLS, 177 N. Y. 562, affirms, without opinion, 86 App. Div. 555, which affirms, on opinion of surrogate, 32 Misc. 493.

The decedent was a beneficiary under the will of her father who directed the sale of his real property, and it thus became in equity personalty. His daughter, Mrs. Mills, under his will took a share in the proceeds of the realty. She survived her father a few years, but died before an actual sale and conversion had taken place. Mrs. Mills left a will by which her interest in her father's estate passed to her husband, John F. Mills, the respondent here. The appraiser held that the interest passing to Mr. Mills under the will of his wife was real estate, and the transfer to him, consequently, was not taxable.

Surrogate Silkman said, page 557: "Mrs. Mills did not die possessed of the title to the real estate; she died possessed of a

right to a distributive share in the proceeds of real estate which her father's executor was directed to sell. * * *

"(Page 558.) The property passed from her father as realty. By the rule of equitable conversion it became personalty in Mrs. Mills' hands, and the proceeds or the right thereto passed from her to her husband as personalty. * * *

"The only ground upon which it can be claimed that the succession to the proceeds of the real estate originally owned by her father, the right to which proceeds passed from Mrs. Mills, to her husband, the respondent, can escape taxation, is the assumed right to reconvert in equity and take the property in specie, instead of the proceeds. But as laws providing for systems of taxation are to be construed as relating to facts, and not according to equitable rules, under the authority of *Matter of Sutton*, 149 N. Y. 618, the decree assessing the tax must be reversed, and the matter sent back to the appraiser for further hearing."

Vide §§ 220 and 221a. The transfer in this case was made before the amendment to the statute which first taxed transfer of real property to persons of 1% class, chapter 41, Laws of 1903, in effect March 16, 1903. As to equitable conversion vide *Matter of Dows*, 167 N. Y. 227-232, sustained in 183 U. S. 278, sub nom. *Orr v. Gilman*; *Matter of Baker*, 67 Misc. 360.

1904.

MATTER OF HENRY B. BAKER, 178 N. Y. 575, affirms, on opinion below, 83 App. Div. 530, which affirmed 38 Misc. 151.

Intestate died a resident July 25, 1901. He was married on January 11, 1900, and prior to such marriage the parties entered into a written ante-nuptial agreement by which the intestate agreed to leave her by will the sum of \$20,000. After his death an arrangement was entered into between his widow and a sister of intestate whereby the widow accepted the proceeds of a \$10,000 life insurance policy, upon the life of the intestate which had been transferred to her by the intestate, in part satisfaction of the amount due her upon her contract, and the remaining sum of \$10,000, with interest, was subsequently paid to her from the estate.

The court say, page 532: "The only question involved in this appeal is the construction to be given to subdivision 3 (now 4) of section 220 of the General Tax Law (Laws of 1896, chap. 908,

as amended by Laws of 1897, chap. 284), which provides for the imposition of a transfer tax 'when the transfer is of property made by a resident * * * by deed, grant, bargain, sale or gift made in contemplation of the death of the grantor, vendor or donor, or intended to take effect in possession or enjoyment at or after such death.'

"It will be doubtless conceded that the respondent's claim is not one which is dependent for its validity upon a deed or grant of any kind, and, furthermore, that it is not testamentary in its character, although it did not become due and payable until after the death of her husband. It was simply the outgrowth of a contract entered into between the decedent and the claimant, which was founded upon a perfectly good and valuable consideration, and one which is regarded with favor by the law and will generally be enforced in accordance with the intention of the parties. (*Johnston v. Spicer*, 107 N. Y. 185; *Peck v. Vandemark*, 99 id. 29; *White v. White*, 20 App. Div. 560.)

"It would seem to follow, therefore, that a claim arising from such a source is in the nature of a debt against the estate and as such enforceable like any other debt (*Hegeman v. Moon*, 131 N. Y. 462; *Warner v. Warner*, 18 Abb. N. C. 151); and if this is its character we do not see why it should be subject to taxation under the Transfer Tax Law any more than if it were a debt represented by a bond or note.

"(Page 533.) But it is said that the contract was entered into in contemplation of and was not 'intended to take effect in possession or enjoyment' until after the death of the obligor. This, in a certain sense, is doubtless true, as it would be of any other form of debt the payment of which was deferred until after the death of the debtor, but this does not affect its validity nor alter its character.

"Neither, in our opinion, does it subject the debt to taxation under the act in question, unless it can be shown that the agreement was entered into in bad faith and with some evasive intent. (*Matter of Bullard*, 76 App. Div. 207, citing with approval, *Matter of Spaulding*, 49 id. 541.)

"This court has held that the words 'in contemplation of the death' do not refer to that general expectation which every mortal entertains, but rather the apprehension which arises from some existing condition of body or some impending peril."

Held, that the amount paid in settlement of the claim under the ante-nuptial agreement was not taxable, there being nothing

in the case to lead the court "to suppose that the ante-nuptial contract was entered into with any design to evade the law or that its provisions for the benefit of the respondent were made in contemplation of death, within the meaning of that term" as the court defined it.

Vide subdivision 4 of § 220; *Matter of Craig*, 97 App. Div. 289, affirmed, on opinion below, 181 N. Y. 551; *Matter of Hess*, 110 App. Div. 476-478, affirmed on opinion of Spring, J., 187 N. Y. 554; *Matter of Kidd*, 188 N. Y. 274-279; *Matter of Majot*, 135 App. Div. 409-411, affirmed, with opinion, 199 N. Y. 29; *Matter of Demers*, 41 Misc. 470-473; *Matter of Vietor*, N. Y. Law Journal, May 8, 1913, opinion quoted sub *Good Will*, page 714; *Matter of Ahrens*, id., May 14, 1913, opinion quoted sub *Contemplation of Death*.

1904.

**IN THE MATTER OF THE APPRAISAL UNDER THE
TRANSFER TAX ACT OF THE TRUST ESTATE HELD
FOR THE LIFE OF JOHN O'BERRY WITH RE-
MAINDER, UNDER THE WILL OF LOFTIS WOOD,
DECEASED, 179 N. Y. 285.**

Loftis Wood died on the 16th day of April, 1884, leaving a last will and testament, which was admitted to probate by the Surrogate's Court of Kings county on May 6, 1884. By the terms of this will certain property was directed to be held in trust for John O'Berry during his life, and upon his death to be divided among certain remaindermen, among whom was Mary J. Howey, the petitioner in this proceeding. John O'Berry died on the 18th day of August, 1901. Thereafter a proceeding was instituted by the executor of the said Loftis Wood for the appraisal of said remainder interests for taxation, resulting, on December 4, 1901, in an order of the Surrogate's court taxing the transfer to Mary J. Howey at \$1,172.88.

The court say, page 287: "Subsequently this court held that a transfer tax upon remainders vested prior to the passage of the law taxing such interests was void as in conflict with the Constitution. (*Matter of Pell*, 171 N. Y. 48.) * * * In this case the Surrogate has reversed his original order and directed the comptroller to refund the tax so paid with interest. * * *

"The tax in question was imposed and collected by the state under color of a law that was absolutely void. It was a void tax and not merely voidable for some irregularity or error, and had

no support except an unconstitutional statute. Such a law is simply void. It confers no rights, imposes no duties, confers no power, and in legal contemplation is as inoperative for any purpose, as if it had never been passed. (*Norton v. Shelby County*, 118 U. S. 425; *Matter of Brenner*, 170 N. Y. 185-194.) So that the only question before us is whether the comptroller, having received the money without right and used it for the purposes of the state under a promise to refund it, was properly charged by the court with interest. * * * (Page 288.) In the *Scrimgeour* case, the Surrogate, under the same statute, reversed the order imposing the tax, as he did in this case, and directed that it be refunded with interest. That order was affirmed at the Appellate Division (80 App. Div. 388) and in this court (175 N. Y. 507)."

Held, (page 291) that the contention of the comptroller "that the payment of the tax was voluntary and hence not recoverable needs no answer, since a tax collected and paid under a void law can never be deemed a voluntary act on the part of the taxpayer." Further, (page 293) that the surrogate was correct in directing that the refund be made with interest.¹

¹ Section 225 was amended by chapter 323, Laws of 1907, in effect May 8, 1907, by specifically providing that "the representatives of the estate, legatees, devisees or distributees entitled to any refund under this section shall not be entitled to any interest upon such refund."

As to vacating decree vide *Matter of Hoople*, 179 N. Y. 308; *Matter of Willets*, 119 App. Div. 119-123, affirmed, without opinion, 190 N. Y. 527, and cases cited sub *Vacating Decree*.

As to remainders accrued prior to statute vide *Matter of Haight*, 76 Misc. 380-382, affirmed, 152 App. Div. 228, and cases cited in *Matter of Smith*, 150 App. Div. 805-808.

1904.

MATTER OF WILLIAM H. HOOPLE, 179 N. Y. 308, reverses 93 App. Div. 486.

Testator died June 17, 1895. The Appellate Division say, page 487: "The tax which the executor paid to the county treasurer of Queens county on November 29, 1895, under the compulsion of an order of the Surrogate's Court made on the 9th day of August in the same year, was assessed upon bonds of the United States government which were exempt from taxation under the Transfer Tax Law of 1892 (chap. 399), and the assess-

ment was, therefore, illegal and void. (Matter of Whiting, 150 N. Y. 27; Matter of Sherman, 153 id. 1.) This is conceded by the respondent.

"The order under review, however, vacating the order taxing the United States bonds of the decedent was not applied for or made until October, 1903, nearly eight years after the tax had been paid, and the principal contention upon this appeal is that the executor's right to enforce a repayment as against the State Comptroller is barred by the lapse of time and the Statute of Limitations."

The Court of Appeals say, page 311: "It is a fundamental principle of our jurisprudence that no action will lie against a sovereign state, or any of its officers, to enforce an obligation of the state without express legislative permission (*People v. Denison*, 84 N. Y. 272; *Lewis v. State of N. Y.*, 96 id. 71; *Locke v. State of N. Y.*, 140 id. 480; *Smith v. Reeves*, 178 U. S. 436; *Flagg v. Bradford*, 181 Mass. 315); and when a state does abdicate this attribute of sovereignty and permits itself to be sued, the citizen who benefits by such an act of grace acquires no vested right thereby, but simply a privilege voluntarily granted by the state, which may be hedged about with terms and conditions, and may be withdrawn as freely as it was given. [*Beers v. Arkansas*, 20 How. (U. S.) 527; *Parmenter v. State of N. Y.*, 135 N. Y. 154; *Baltzer v. North Carolina*, 161 U. S. 240; *Railroad Company v. Tennessee*, 101 id. 337; *Railroad v. Alabama*, id. 832.] In the light of these principles it is obvious that the statutes under discussion (ch. 399, L. 1892; ch. 284, L. 1897; ch. 382, L. 1900) invested the respondent with no absolute right, but conferred upon him a mere privilege, the extent and duration of which depended entirely upon the language conferring it."

The court discusses the various statutes in effect during said eight years and held that claim was barred by lapse of time, and reversed the surrogate and the Appellate Division.

Vide § 225. Matter of O'Berry, 179 N. Y. 285; Matter of Buckingham, 106 App. Div. 13-17; Matter of von Post, 35 Misc. 367; Matter of Townsend, 153 App. Div. 85, appeal pending; Matter of Scott, 208 N. Y. 602, quoted *post*, page 396, and cases cited sub Vacating Decree.

1904.

**IN THE MATTER OF THE ACCOUNTING OF WILLIAM
G. TRACY ET AL., AS EXECUTORS OF AND TRUS-
TEES UNDER THE WILL OF GEORGE N. KENNEDY,
179 N. Y. 501.**

Testator died September 7, 1901. The court say, page 505: "The will is lengthy, containing numerous provisions, but its general scheme can be briefly stated. The entire property, real and personal, after the payment of debts and legacies, is converted into trust estates for the benefit of life tenants and remainder-men, all of the latter being contingent, depending upon the status at the death of the life tenant, except the defendant, the Syracuse University, which takes its estate in remainder upon the death of Elizabeth K. Freeman, a daughter of the testator."

The executors and trustees attack the decree of the Surrogate's Court of Onondaga county, entered upon the judicial settlement of their accounts, to wit:

(1) Wherein it adjudges that the taxes on life estates, created by the will, assessed under the State Transfer Tax Law and the United States War Revenue Tax Law, should be deducted from the income and rents, to which each of said life tenants were respectively entitled, before any part of the same should be paid to them.

(2) Wherein it is adjudged that out of the income of the personal property of the deceased, now in the hands of said executors, they pay to James Rohm the sum of \$350.00, for and on account of his annuity, from the death of the testator up to the 4th day of November, 1902, from which shall be deducted the state tax of \$146.34, and that said annuity be paid by deducting the same from the wages of said Rohm, paid to him by said executors, amounting to \$65.00 a month.

The Transfer Tax Law as it existed after the amendment of 1899 and 1900 is applicable to this case. The court say, page 508: "These amendments are sought to supply what were deemed omissions in the Transfer Tax Law as it then stood, as some of the courts had decided that the Transfer Tax on life estates was payable out of income and no tax could be imposed on contingent remainders. (Matter of Johnson, 6 Demarest, 146; Matter of Roosevelt, 143 N. Y. 120.) The present appeal is controlled by the Transfer Tax Law (Laws of 1896, chapter

908, section 230), as amended by chapter 76 of the Laws of 1899 and chapter 658 of the Laws of 1900. The material portions of section 230 read as follows: 'Whenever a transfer of property is made, upon which there is, or in any contingency there may be, a tax imposed, such property shall be appraised at its clear market value immediately upon such transfer, or as soon thereafter as practicable. The value of every future or limited estate, income, interest or annuity dependent upon any life or lives in being, shall be determined by the rule, method and standard of mortality and value employed by the superintendent of insurance in ascertaining the value of policies of life insurance and annuities for the determination of liabilities of life insurance companies, except that the rate of interest for making such computation shall be five per centum per annum. * * * When property is transferred in trust or otherwise, and the rights, interests or estates of the transferees are dependent upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended or abridged, a tax shall be imposed upon said transfer at the highest rate which, on the happenings of any of the said contingencies or conditions, would be possible under the provisions of this article, and such tax so imposed shall be due and payable forthwith by the executors or trustees out of the property transferred.'

"It thus appears that whenever a transfer of property is made, upon which there is, or by any contingency there may be, a tax imposed, the property is to be properly appraised at its clear market value and the transfer tax is due and payable forthwith out of the property transferred.

"In *Matter of Vanderbilt* (172 N. Y. 69) this court construed section 230 of the Transfer Tax Law, as affecting the payment of the tax upon contingent remainders, and held that the tax was payable forthwith out of the property transferred.¹ * * *

"(Page 509.) As our decision in *Matter of Vanderbilt* (*supra*) dealt only with a contingent remainder, this case, technically speaking, is not strictly in point, but the principle announced therein is necessarily involved in life estates created by trusts.

"In the case at bar it is the duty of the executors and trustees to ascertain the value of the respective life estates and estates in remainder in the manner pointed out by section 230; and having done this, they should compute the transfer tax and pay the same forthwith out of the property transferred. The result is that the life tenant loses, during the continuance of his estate,

the interest upon the corpus of the trust so paid out, and eventually the remainderman receives his estate diminished by the amount of said payment.

"Whether this mode of taxation works out exact justice as between the life tenant and the remainderman is a question with which the court is not concerned.

"As we read the statute, the legislative intention is clear that the transfer tax shall be paid out of the corpus of the trust estates, and not out of the income.

"It, therefore, follows that the transfer taxes imposed upon the estates for life and in remainder, created by the eighty-thousand dollar trust, under which testator's daughter, Jessie B., is the life tenant, are payable out of the principal of that trust.

"Also that the transfer taxes imposed upon the estates for life and in remainder, in the various trusts carved out of the residuary estate, are payable from the principal of said trusts respectively.

"We will now consider the second provision of the decree, from which appeal is taken, in reference to the annuity of three hundred dollars for the benefit of James Rohm, payable semi-annually. Annuities are expressly referred to by section 230, as already quoted. The manner in which this annuity is dealt with in the decree of the learned surrogate is unsupported by the statute. The probable duration of the annuitant's life should be ascertained in the manner pointed out by section 230, which is under the rule, method and standard of mortality and value employed by the superintendent of insurance in ascertaining the value of policies of life insurance and annuities, etc. This fact being ascertained, the amount of the transfer tax is computed thereon and becomes forthwith payable out of the fund set aside for creating the annuity. (In this case it happens to be the residuary estate.)

"The method of returning to the residuary estate the tax so paid by the trustees is as follows: Take for illustration an annuitant whose probable duration of life is ten years. The trustees would deduct from each annual payment as made one-tenth of the tax and restore it to the residuary estate.

"In the case at bar the death of the annuitant was suggested on the argument as having taken place since that of the testator. Any portion of the transfer tax not restored to the estate by the process indicated at the time of the annuitant's death would be a loss which the residuary estate must sustain.

"The payment of the annuity by deducting the same from the wages of said Rohm, paid to him by said executors, amounting to sixty-five dollars a month, as provided in the surrogate's decree, is wholly irregular. The annuity was based on the long and faithful services of the annuitant, and is entirely distinct from the matter of wages which were to be paid him by the executors if he remained in the service of the daughter, to Jessie B."

¹ Vide footnote, page 269, to *Matter of Vanderbilt*, 172 N. Y. 69; *Matter of Kennedy*, 93 App. Div. 27.

As to annuities vide third paragraph of § 230; *Matter of Maresi*, 74 App. Div. 76; *Matter of Hutchinson*, 105 App. Div. 487; opinion of Comptroller, *Matter of Sidney*, 2 State Department Reports, 505; *Matter of Hall*, 36 Misc. 618; see, however, *Matter of White*, 208 N. Y. 64, and *Matter of Jones*, 28 Misc. 356, affirmed, 172 N. Y. 575.

As to payment of tax out of corpus and not out of income vide *Matter of Hoyt*, 44 Misc. 76; *Matter of Bass*, 57 Misc. 531-533; *Matter of Title Guarantee & Trust Co.*, 81 Misc. 106-112.

1904.

MATTER OF JOSHUA MATHER, 179 N. Y. 526, affirms, without opinion, 90 App. Div. 382.

Testator died August 1893. By his will he gave to Charles W. Mather, a nephew, the possession, use, income, profits and rents of the residuary estate during his lifetime, and the entire control and management of the estate, personal and real, as he might deem for his best interests, and that of the persons who, under the will, would be ultimately interested in the estate, of which he was to have the income during his lifetime, authorizing him to conduct the business in the name of the testator or otherwise, and empowering the said Charles W. Mather to make such disposition of the estate as he might deem wise among his descendants whom he might leave, and in such propositions and amounts as he might desire. He further provided that if, for any reason, the said Charles W. Mather failed to make such will, or if such will was not admitted to probate, the property enjoyed by said Charles W. Mather during his lifetime should go to the persons whom the said Charles W. Mather might leave as his next of kin and heirs at law, at the time of his death in the same manner and proportions as if the said

Charles W. Mather had been the absolute owner thereof at the date of his death and had died intestate and unmarried.

(Page 384.) Upon the transfer tax appraisal of the estate of his uncle "Charles W. Mather was examined and testified that Joshua Mather, at the time of his death, was the owner of certain real estate in the city of Utica and known as the Arcade property.

"This Arcade property was appraised at \$175,000 and the tax upon the life interest of Charles W. Mather was fixed at \$4,852. The tax upon the residuary interest was suspended until the death of Charles W. Mather, as it was uncertain to whom the property would descend; if it was disposed of by the will of Charles W. Mather, his estate would be liable for the tax, and if not, then the persons to whom it descended would be chargeable therewith.

"Charles W. Mather died in November, 1899, intestate, not having exercised the power of disposition given by the will. The petitioners are the heirs of Charles W. Mather.

"After the death of Charles W. Mather, a deed, executed by Joshua Mather to Charles W. Mather, conveying the Arcade property above mentioned was found among the papers of Charles W. Mather. The petitioners thereafter upon investigation, made an application to the Surrogate's Court to have the assessment set aside, the Arcade property stricken from the proceedings had upon the assessment, to correct the report and order by striking therefrom the amount included therein as a tax upon the Arcade property, and for other relief. The surrogate, upon such application, after taking evidence, modified the order, in so far as it assumed to assess a tax against the heirs of Charles W. Mather, but refused to set aside or modify the assessment as against Charles W. Mather." ¹

The court, in affirming the surrogate's order, say (page 385): "The evidence clearly showed that the deed from Joshua Mather to Charles W. Mather was made and delivered during the lifetime of Joshua Mather, and, although it was not recorded until after the death of Charles W. Mather, there was nothing to impeach its validity, except the statement made by Charles W. Mather upon the assessment proceedings.

"It is true that the evidence that he made a statement is not contradicted, nor is it explained, and it may be quite possible that if the original parties were able to speak, some explanation could be given of that statement; but whatever force it might

have against Charles W. Mather, his heirs, the petitioners herein, would not be bound by such statement.

"Charles W. Mather, for some undisclosed reason, determined to ignore the absolute title for the time being and submit to the imposition of the tax.² He was under no restraint or duress; whatever he did was voluntary, and, presumably, for what he deemed to be his best interests. His heirs, however, have the same right that he had, namely, to rely upon their title under the will of Joshua Mather, or upon the deed from Joshua Mather. Unlike their ancestor, they prefer to rely upon the deed, and they are not foreclosed from doing this by any act of Charles W. Mather. It is true that, as to the property, they acquire no better title than Charles W. Mather had, but as to the method of the enjoyment of their estate, they are quite independent of and not bound by any acts of Charles W. Mather. The statement and act of Charles could only affect his estate and his enjoyment of the property, and, therefore, the tax was properly levied against him, as, upon his own statement, he claimed under the will; but he did not assume to bind his heirs, nor would they be estopped by his statement, had he so assumed. No tax has ever been assessed against them, they have promptly asserted their rights, and, upon the first opportunity to be heard, have elected to stand upon their title under the deed. They have been guilty of no *laches*, and no valid reason has been presented for estopping them from so doing."

¹ Vide subdivision 6 of § 2481 of Code of Civil Procedure, and cases cited sub Vacating Decree.

² Matter of Merritt, 155 App. Div. 228, as to right to renounce legacy, etiam Matter of Wolfe, 89 App. Div. 349, affirmed, without opinion, 179 N. Y. 599. As to assignment of legacy vide Matter of Cook, 187 N. Y. 253-258.

1904.

MATTER OF CHRISTOPHER WOLFE, 179 N. Y. 599, affirmed, without opinion, 89 App. Div. 349.

Testator died June 14, 1901, bequeathing to his executors, the appellants, the sum of \$20,000 absolutely. The residue of his estate he gave to the executors in trust for his surviving children and for the descendants of any child who may have died. The appellants, some eight months afterwards, by appropriate instruments in writing, duly acknowledged, renounced

and released the bequest of \$20,000 in ample terms, so that the money bequeathed to them should fall into the residuary trust for the benefit of the testator's children and their descendants. By the decree appealed from the surrogate affirmed an appraisal by which the legacy in question was taxed at five per cent on the theory that the bequest to the appellants was effective for the purposes of taxation, instead of at one per cent, the rate which would be chargeable as against the residuary shares. There is nothing to indicate that the renunciation by the appellants is not in good faith or that it has been made for the purpose of evading any provision of law in relation to taxation.

The court say, page 350: "The decision of the learned surrogate is placed upon the ground that under the law the legacy to the appellants became subject to the tax immediately upon the death of the testator, and that the appellants could not defeat the right of the State to that tax or any part of it by any subsequent act of their own. The force of this view might be convincing if the tax was imposed upon the legacy, but it is greatly weakened by the consideration that the tax is not imposed upon the property at all, although payable out of it, but is imposed upon the succession to, or transfer of, the property. By § 242 (now 243) of the Tax Laws of 1896, ch. 908 as amd. by Laws of 1901, ch. 173, the word 'transfer' is defined to include 'the passing of property or any interest therein in possession or enjoyment, present or future, by inheritance, descent, devise, bequest, grant, deed, bargain, sale or gift.' The transfer tax, therefore, which is the basis of the subject of this controversy must be regarded as a tax, not upon the money which is the subject of the legacy, but upon the passing of that money under the will in possession or enjoyment. Had the appellants accepted and taken the legacy no question could have arisen. Having voluntarily relinquished it so that it lawfully passes under the will to the testator's children and their descendants, I am inclined to the view that the State can only seize that fraction of it which would have been assessable had the will originally provided for such a devolution.

"The Tax Law (*supra*) nowhere expressly provides that a transfer by bequest, deed or gift which is refused by the beneficiary shall be taxed the same as if accepted. On the theory of the decision herein in the court below, if one person tendered to another a deed or gift to take effect upon the death of the donor, the most positive refusal of the donee to accept the benefaction

and the consequent rendering abortive of the entire scheme would not avail to avoid the tax. The tax would be imposed in such a case, not upon the transfer, but upon the attempt to transfer. If the law contemplated that the tax should be imposed in the case suggested, there is no obvious reason why the purpose should not have been manifested in the statute by explicit expression. To construe the law so as to incorporate such a provision into it is violative of the rule of construction applicable, for it has been often held that the Tax Law should be construed strictly in favor of the citizen and against the State. * * *

“(Page 353.) If the legatee renounce the gift and refuse to receive it, no tax can be collected with respect to him because there has been no transfer to him. His right to renounce the privilege of accepting the donation is not denied or forbidden by the statute, and such right is recognized by the authorities, or some of them, which I have cited. On his effective renunciation the title to or ownership of the property of the gift remains in the estate to be disposed of under the terms of the will, and the succession is taxable in accordance with the nature of the ultimate devolution. The fact that the tax is payable at the death of the testator controls the question of interest, but certainly controls no other question germane to the point now under consideration. * * *

“(Page 354.) It may well be that a different question would be presented by a transfer operating under the laws of inheritance or descent. In such a case the transfer is effective by operation of law and calls for no act of volition on the part of the heir or next of kin. * * * The law as it is would seem to require that, under the circumstances of this case, the tax should be levied upon the succession or transfer as it will actually take place upon the settlement and distribution of the estate, and not as was designed in his will by the testator.¹ No authoritative decision is cited by the learned counsel for the respondent to the contrary, although some loose expressions have been found in opinions which may give color to that view, while the logic of those decisions to which allusion has been made in this opinion certainly justifies, if it does not compel, the conclusion which I have reached.”

Vide §§ 226 and 243. As to assignment of legacy vide *Matter of Cook*, 187 N. Y. 253-257. As to renunciation of part vide *Matter of Merritt*, 155 App. Div. 228-232.

¹ *Matter of White*, 208 N. Y. 64, as to life estates where life tenant dies before probate of will; vide etiam *Matter of Jones*, 28 Misc. 356-357, affirmed, 172 N. Y. 575.

1904.

MATTER OF ROBERT T. CLINCH, 180 N. Y. 300, affirms 99 App. Div. 298, which affirmed 44 Misc. 190.

Testator died a resident of Paris, April 12, 1899. He left a will, which on the 23d of February, 1900, was admitted to probate by the Surrogate's Court of the county of New York, and letters testamentary were, on the thirtieth of April following, issued to the executor therein named; all the property which he owned or in which he had any interest in the State of New York at the time of his death was such as came to him under the will of his father, Charles J. Clinch, a resident of Paris, who died on the 22d of July, 1898, at Paris.

The father's will was admitted to probate in the Surrogate's Court of the county of New York, and letters testamentary were issued to the executors named therein on the 6th of September, 1898. At the time of the death of Robert his father's executors had not accounted for or made any distribution of his estate, and the time allowed by § 2726 of the Code of Civil Procedure for this purpose had not then expired; on the 14th of June, 1899, they did, however, make such distribution, and there was then set apart for the estate of Robert, and delivered to his executors, certain personal property, consisting of stocks in New York corporations, bonds, etc., all of which were physically present in the State of New York, and it is upon the transfer of this property that a tax has been imposed, the validity of which is challenged by the substituted trustee under the will of Robert.

The court say, page 302, "It is true that in the case of *Matter of Phipps* (77 Hun, 325; affirmed on opinion below, 143 N. Y. 641) Judge Van Brunt said that the right to a legacy given by the will of a resident of this State to a non-resident could not be considered property located within this State." The court then refers to the four cases subsequently decided, *Bronson*, *Whiting*, *Morgan*, and *Houdayer*, 150 N. Y. 1; *id.* 27; *id.* 35; *id.* 37, and also to *Blackstone's case*, 171 N. Y. 682, and thereupon held that the interest of Robert T. Clinch in his father's estate was subject to the inheritance tax.

The court further say, page 303: "This court held in *Matter of Zefita*, Countess De Rohan-Chabot, 167 N. Y. 280, that the transfer tax could not be imposed on a legacy of a residuary estate until the amount of that estate is ascertained. * * * In the case at bar the transfer tax was imposed after the amount of the residuary estate had been ascertained, and clearly falls within the law as laid down in the case cited."

Vide subdivision 2 of §§ 220 and 243. As to definition of "tangible" property vide *Matter of Dusenberry*, 2 State Department Reports, 501, opinion quoted, *supra*, page 119.

Matter of Lord, 111 App. Div. 152, affirmed, without opinion, in 186 N. Y. 549, sustained in 211 U. S. 477, sub nom. *Beers v. Glynn*; *Matter of Armstrong*, N. Y. Law Journal, February 20, 1912, opinion quoted, *post*, page 733; *Matter of Clark*, id., February 9, 1912, opinion quoted, *post*, page 754; *Matter of Page*, id., April 13, 1912, opinion quoted, *post*, page 610; *Matter of Rosenbaum*, id., August 7, 1913, opinion quoted, *post*, page 730.

Matter of Gans, N. Y. Law Journal, April 13, 1912, opinion quoted, *post*, page 862.

1905.

MATTER OF ABRAM S. HEWITT, 181 N. Y. 547, affirms, without opinion, 98 App. Div. 624, which affirms, without opinion, the order of Surrogate Thomas, New York Law Journal, June 18, 1894.

Testator died a resident of New Jersey on January 18, 1903. At the time of his death he was the owner of two certificates of deposit in two New York trust companies, neither of which certificates were, at the time of testator's death, within the State of New York. The appraiser reported as taxable the transfer of the certificates of deposit and also the interest thereon accrued to the date of death of decedent.

Surrogate Thomas confirmed the appraiser's report and in his opinion said: "The certificates of trust companies evidence deposits of money and not loans. They are not negotiable instruments, for they were not payable to the order of the depositor, and it was expressly stipulated that they were 'assignable only on the books of the company.' In this respect they differ from the documents passed upon in all of the cases cited by the appellant, in which the language of the papers in question appear. Savings bank deposits by a non-resident are taxable (*Matter of Romaine*, 127 N. Y. 80-89), though the production of the passbook is always made a condition for payment to the

depositor. These deposits were, therefore, properly included in the appraisal."

As to certificates of deposit vide *Matter of Fearing*, 138 App. Div. 881-884, affirmed, 200 N. Y. 340. Intangible property of a non-resident not taxable if transferred since the amendment by Laws of 1911, chapter 732, in effect July 21, 1911; subdivision 2 of § 220 and § 243.

1905.

IN THE MATTER OF THE TRANSFER TAX ON THE ESTATE CONVEYED IN TRUST FOR HIS OWN BENEFIT OF HECTOR CRAIG, NOW DECEASED, 181 N. Y. 551, affirms, on opinion below, 97 App. Div. 289.

Hector Craig, by trust deed of December 20, 1875, transferred all his property of every kind and nature to certain trustees in contemplation of his then pending marriage with the appellant Mary D. Craig (then Mary W. Darrach), and for the purpose as recited in the deed of making provision for her in case the marriage takes place and she survives him as his widow, and of otherwise providing for the management and disposition of his estate. No power of revocation is contained in the deed. The marriage occurred prior to 1885. By its terms the net income of all the property was made payable to the deceased during his lifetime, and at his death the principal was to be paid over to his widow and the issue of the marriage in specified proportions. Mr. Craig died May 29, 1901, leaving the appellants, his widow and children; and it is undisputed that by virtue of the trust deed and of certain legal proceedings in relation to it had between the time of its execution and the grantor's death, and by virtue of certain releases executed by other beneficiaries named in the deed prior to May 9, 1885, the appellants have become entitled to the entire estate.

The appellants contended that prior to the passing of the first law taxing inheritances (Laws of 1885, chapter 483, in effect June 30, 1885), (page 292), "they had acquired their rights by irrevocable deed; that such rights whether vested or contingent then constituted present property interests in future estates which were vested in the sense that they were secured to them by deed, subject only to contingencies as to time and survivorship; that incident to the ownership of such property was the absolute right to its acquisition in possession and enjoyment at the stipulated time; and that such ultimate right of

possession and enjoyment, being absolute and not merely privileged, could not afterwards be taxed by the State because of well-settled principles of constitutional law."

The court say, page 291: "It seems to me to be immaterial to consider whether the remainders created by the trust instrument to which the appellants have now become entitled are to be regarded as vested or contingent, or whether the instrument is to be regarded as conveying such remainders as gifts *inter vivos* or gifts *causa mortis*. The point presented by the appeal is that the right as a property right to take the gifts when the time for possession and beneficial enjoyment should ultimately arrive had fully accrued at the date of the marriage and the birth of the children free from any existing tax upon the transfer regarded either as a transfer then made or contemplated in the future, and that subsequent legislation imposing such a tax must be deemed unconstitutional as in effect the taking of private property for public use without compensation or as impairing the obligation of a contract. * * *

"(Page 293.) In both the act of 1892 and the existing act it is provided that transfers by deed or gift made in contemplation of the death of the grantor or donor, or intended to take effect, in possession or enjoyment, at or after his death, shall be taxed when the grantee or donee becomes beneficially entitled in possession or expectancy to the property given by the transfer, whether made before or after the passage of the act. (Laws of 1892, chap. 399, § 1, subd. 3; Laws of 1896, chap. 908, § 220, subd. 3, renumbered subds. 3, 4, and amd. by Laws of 1897, chap. 284.) * * *

"(Page 295.) The deed in this instance was made, not in contemplation of death, but of marriage, and was designed to make an effective provision *in presenti* for the prospective wife and the possible offspring. No reservation being made of the power of revocation it became operative and effective as a grant upon execution and delivery wholly irrespective of the time when possession was to be given of the estate conveyed, to the same extent and in the same sense and degree as a devise of a remainder becomes operative and effective upon the death of a testator during the existence of an intermediate estate, and the logic which precludes legislative impairment in the one case is equally imperative in the other. The difference between rights and interests conferred or created by the execution of a will and those conferred or created by the execution and delivery

of a deed is inherent. The will may be canceled and revoked or other testamentary disposition made without in general impairing any property rights of the devisees. But whatever rights are conferred or created by deed are conferred or created generally when the deed becomes operative and effective as such, and if conferred or created without the power of revocation cannot be afterwards affected or destroyed by either the grantor or the law.

"I do not lose sight of the fact that the transfer tax is levied, not upon the property affected, but upon the right of succession. The underlying principle which supports the tax is that such right is not a natural one but is in fact a privilege only, and that the authority conferring the privilege may impose conditions upon its exercise. But when the privilege has ripened into a right it is too late to impose conditions of the character in question, and when the right is conferred by a lawfully executed grant or contract it is property and not a privilege, and as such is protected from legislative encroachment by constitutional guaranties."

The order assessing tax was reversed and the proceedings dismissed.

Vide subdivision 4 of § 220. *Matter of Kidd*, 188 N. Y. 274-279; *Matter of Demers*, 41 Misc. 470; *Matter of Smith*, 150 App. Div. 805-809; *Matter of Haight*, 76 Misc. 380-382, affirmed, 152 App. Div. 228; *Matter of Hitchins*, 43 Misc. 485, affirmed, 181 N. Y. 553; *Matter of Hawes*, N. Y. Law Journal, April 8, 1913, opinion quoted sub *Trust Deed*, page 874.

1905.

MATTER OF JOHN HITCHINS, 181 N. Y. 553, affirms, without opinion, 101 App. Div. 612, which affirms, without opinion, 43 Misc. 485.

Testator died October 1, 1884, leaving to his widow a life estate with remainder over on her death or remarriage. Widow therefore died unmarried in 1902. The surrogate said, page 490: "The Comptroller admits that if this will created legacies which vested at death of testator, such legacies are not taxable, although they only now come into the actual possession and enjoyment of the beneficiaries. But he earnestly contends that the legacies did not so vest; that they constitute future gifts which were not transferred until the death of the life tenant in 1902. * * *

"(Page 492.) We, therefore, find that the words 'go to and belong to' as used in this will, should not be construed to mean 'pay and divide' and that the rule of construction claimed by the Comptroller to be applicable to this will must yield to the manifest intention, both expressed and implied, of making present gifts, which vested upon his death. * * *

"(Page 493.) Where a vested though defeasible interest in remainder passes under a will to a remainderman on the testator's death, though the possession does not pass until the death of the life tenant, the transfer or succession is referred to the time of the death of the testator, and if that occurred prior to the enactment of the act taxing transfers of property, the remainder is not taxable. *Matter of Seaman*, 147 N. Y. 69; *Matter of Stewart*, 131 id. 274; *Matter of Curtis*, 142 id. 219; *Matter of Langdon*, 153 id. 6."

Vide *Matter of Smith*, 150 App. Div. 805.

1905.

MATTER OF EDWARD M. CAMERON, 181 N. Y. 560, affirms, without opinion, 97 App. Div. 436.

The court say, page 437: "We think that the Surrogate of Suffolk county, upon the petition and proofs presented to him in this proceeding, was justified in setting aside the original order imposing a transfer tax upon the moneys which the executor had received from the estate of Richard Arnold, inasmuch as it appeared without contradiction that such moneys were the proceeds of an interest of the decedent in real estate, and were, therefore, not subject to any tax under the laws of this State in relation to taxable transfers of property.¹

"It is contended in behalf of the Comptroller that the Surrogate, instead of vacating the prior order, should have remitted the whole matter to the official appraiser to make the computation upon which the taxability or non-taxability of the property depends. His position in this respect might be correct if there was any proof whatever in opposition to that presented by the executor in his moving papers. No evidence was offered before the surrogate, however, to controvert any of the facts upon which the executor based the present application.

"It is true that the order now under review is expressly based upon evidence stated to have been discovered since the

entry of the original order, and ordinarily where a determination is set aside on the ground of newly-discovered evidence, the order setting it aside should not contain an adjudication the other way, but should provide for a new hearing upon which both parties may be heard. Here, however, it is plain enough that the State Comptroller has no means of controverting the facts relied upon by the executor to establish the exemption of the property in question, and under these circumstances we think it would have been an idle ceremony for the surrogate to send the matter back to the official appraiser, particularly as under § 232 (now § 231) of the Tax Law, he is expressly empowered to determine the cash value of an estate and the amount of tax to which the same is liable, without appointing an appraiser. If he could have done it before the original order there is no reason why he cannot do it now.

"On the other hand, we do not think we ought to interfere with the surrogate's refusal to insert in the order a direction to the State Comptroller to refund the amount of the tax. Such provisions are common in orders of this kind, and orders containing them frequently have been affirmed in this court and the Court of Appeals. (Matter of Silliman, 79 App. Div. 98; affirmed, 175 N. Y. 513; Matter of Scrimgeour, 80 App. Div. 388; affirmed, 175 N. Y. 507.) A direction to the State Comptroller to refund seems proper enough. It affords no real ground of objection on the part of that officer, inasmuch as it gives expressed judicial sanction to his repayment of the tax. It is not at all essential, however, to the preservation or enforcement of the rights of the party entitled to such repayment because the statute itself commands the State Comptroller in cases of this kind to direct and allow the treasurer of the county² or the comptroller of the city of New York to refund to the persons by whom the tax has been paid, the amount of any moneys paid or deposited on account of such tax in excess of the amount of tax which ought to have been exacted."

Vide §§ 225 and 231; and cases cited sub Vacating Decree.

¹ Transfers of real property to "lineals" first made taxable by Laws of 1903, chapter 41, in effect March 16, 1903. Transfers of real property to collaterals have been taxable since original act of 1885.

² As to form of warrant issued by state comptroller to county treasurer vide *post*, page 764.

1905.**MATTER OF LINDA DOWS COOKSEY, 182 N. Y. 92.**

Testatrix died March 7, 1903. By the will of her father who died in 1890, she was given a life estate in certain property with a special power in trust to designate the manner and terms upon which her children or the issue of such children should take the remainder in said property. The will of her father further provided that if she died intestate then the remainder should go to the children as set forth in his will.

The court say, page 98: "Under the will of Mrs. Cooksey, in exercising the power of appointment she made material changes with reference to paying over the remainder to her children from that incorporated in the will of her father. * * * It appears to us, therefore, that there was a necessity for exercising the power, that it cannot be treated as a nullity, and that, therefore, the transfer tax under the statute was properly assessed."

Vide subdivision 6 of § 220. *Matter of Dows*, 167 N. Y. 227, sustained sub nom. *Orr v. Gilman*, 183 U. S. 278; *Matter of Lansing*, 182 N. Y. 238; *Matter of Spencer*, 119 App. Div. 883-884, affirmed, appeal dismissed, 190 N. Y. 517; *Matter of Ripley*, 192 N. Y. 536; *People ex rel. Ripley v. Williams*, 69 Misc. 402; *Matter of Lewis*, 60 Misc. 643-644, reversed in 194 N. Y. 550; *Matter of Haggerty*, 128 App. Div. 479-483, affirmed, without opinion, 194 N. Y. 550; *Matter of Hull*, 111 App. Div. 322, affirmed, without opinion, 186 N. Y. 586; *Matter of Buckingham*, 106 App. Div. 13; *Matter of Lowndes*, 60 Misc. 506-507; *Matter of Warren*, 62 id. 444; *Matter of Haight*, 152 App. Div. 228-231.

1905.**MATTER OF JANET S. LANSING, 182 N. Y. 238.**

Testatrix died October 13, 1904. The court say, page 242: "The property in question belonged to Thomas Suffern when he died in 1869, and there was then no statute in force which imposed an inheritance or transfer tax.

"Subsequent legislation could not authorize a tax upon the transfer of property effected solely by means of his will, with no aid from the power of appointment. (*Matter of Pell*, 171 N. Y. 48.) The property under consideration never belonged to the daughter, Mrs. Lansing, although she had the income therefrom during her life through a trust created for her benefit by her father's will. By the same sentence which created the trust during her life, the property was given after her

death to the granddaughter, Mrs. McVickar, subject to the exercise of the power of appointment. That power was limited to two classes of persons, consisting of the heirs at law and the collateral relatives of Mrs. Lansing. Mrs. McVickar was her sole heir at law and the power of appointment as formally exercised, gave all the property to her the same as her grandfather had given to her more than thirty years before.

"In other words, the attempt to exercise the power neither increased nor diminished the estate of Mrs. McVickar and did not affect in any degree the value of her grandfather's gift. It did not effectively transfer any property whatever, for she took from her grandfather and nothing was added to or taken away from the gift by the exercise of the power through the will of her mother. The execution of the power left the title where it was before, and the result is the same as if there had been no power to exercise. * * *

'(Page 247.) We pass without serious discussion that part of the statute which provides, in substance, that the failure or omission to exercise a power of appointment subjects the property to a transfer tax in the same manner as if the donee of the power had owned the property and had devised it by will. (L. 1897, ch. 284, § 220, subd. 5, now subd. 6.) Where there is no transfer there is no tax and a transfer made before the passage of the act relating to taxable transfers is not affected by it, because as we held in the Pell case, such an act imposes no direct tax and is unconstitutional since it diminishes the value of vested estates, impairs the obligations of contracts, and takes private property for public use without compensation. (Matter of Pell, 171 N. Y. 48; Matter of Delano, 176 N. Y. 486, 495.)¹ * * *

"(Page 248.) It is not at all necessary to determine whether the remainder which Mrs. McVickar took under her grandfather's will was vested or contingent. If we assume that the remainder was contingent, nevertheless it was acquired by Mrs. McVickar under her grandfather's will at the instant of his death. It then became a property right in her which was just as sacred and just as immune from legislative attack as any other property right. * * * It is true that Mrs. McVickar's estate was subject to be defeated by her death before her mother or by diminution if her mother left other children, but her right to the estate if she survived her mother was indefeasible. I am at a loss to see what bearing the question of a remainder being vested or contingent has to do with the liabil-

ity to the transfer tax when that remainder was created prior to the imposition of any transfer tax. * * * Now, suppose that the state at the time it imposed the inheritance tax instead of enacting that statute had forbidden the making of wills and succession in case of intestacy, itself taking all the property that a decedent might leave at the time of his death, such a statute could have no possible effect on Mrs. McVickar's rights, for those rights had been acquired long before. Therefore, what privilege did she get at that time from the state for which it can charge or impose a tax? The ground on which the Pell case proceeded was that a transfer tax could not be imposed on the acquisition of property where the acquisition had taken place prior to the enactment of the taxing statute. The ground on which the Dows case proceeded was that the legatees took under a power of appointment in a will made subsequent to the enactment of the Inheritance Tax Law, and that the state could impose a tax on property passing under that will."

Held, that there should be no tax.

¹ The portion of statute referred to omitted by the amendment of chapter 732, Laws of 1911, in effect July 21, 1911: subdivision 6 of § 220. Vide etiam *Matter of Dows*, 167 N. Y. 227-232.

Vide *Matter of Backhouse*, 110 App. Div. 737, affirmed, without opinion, 185 N. Y. 544; *Matter of Hull*, 111 App. Div. 322-325, affirmed, without opinion, 186 N. Y. 586; *Matter of Kidd*, 188 N. Y. 274-279; *Matter of Spencer*, 119 App. Div. 883-884, appeal dismissed, 190 N. Y. 517; *Matter of Lewis*, 60 Misc. 643-644, reversed, 194 N. Y. 550; *Matter of Chapman*, 133 App. Div. 337-339, appeal dismissed, without opinion, 196 N. Y. 561; *Matter of Haggerty*, 128 App. Div. 479-483, affirmed, without opinion, 194 N. Y. 550; *Matter of Smith*, 150 App. Div. 805; *Matter of Warren*, 62 Misc. 444-447.

As to exercise of power of appointment over portion of property and not as to the whole vide *Matter of Ripley*, 122 App. Div. 419, affirmed per curiam, 192 N. Y. 536; *People ex rel. Ripley v. Williams*, 69 Misc. 402; *Matter of Stuart*, N. Y. Law Journal, May 10, 1913, opinion quoted sub *Power of Appointment*, page 772.

1905.

MATTER OF MARCUS DALY, 182 N. Y. 524, affirms, without opinion, 100 App. Div. 373.

Testator died a resident of Montana, November 12, 1900. He left money on margin deposit with his brokers in New York and also money was owed to him by William G. Rockefeller of New York. The court discuss at length the question as to the

legal status of the account and debt, and in conclusion say, page 381: "The able and lucid opinion written by Mr. Justice Holmes, in delivering the opinion of the court in the Blackstone case, 188 U. S. 189, leaves nothing to be added to the determination as to the situs of the debt, and it is evident to a demonstration that the fiction of law which ordinarily fixes such situs should be made to yield.

"In the construction of State statutes the Supreme Court of the United States is required to adopt the construction placed upon them by the State courts, and the latter construction by the Court of Appeals of this State is binding not alone upon the Supreme Court of the United States, but also upon tribunals inferior thereto within the State. We think there is no infringement of this rule in holding that for purposes of taxation the situs of the debt is at the place of residence of the debtor, for the reason that in the Blackstone case the construction of this statute was before both courts, both have agreed upon the policy of the State respecting property which could properly be made the subject of taxation, and both have announced the policy of the State respecting such subject. Under such circumstances the reasoning of the Supreme Court of the United States becomes controlling and proceeds somewhat beyond a determination that the State has the constitutional right to tax debts. It not only determined that question affirmatively, but it also determined that under the statute as it then existed debts were taxable. In the Bronson Case, 150 N. Y. 1, it was held that they were not so taxable, because they were not property within the State. When that doctrine was exploded by showing that the rule of construction required that fiction should yield to fact, it carried with it the policy of the State as announced by the Court of Appeals and under such rule it became the construction of the statute.

"The continuous tendency of the courts of this State has been to embrace within the Transfer Tax Law directly or indirectly all property of every species found herein upon the death of the decedent. That policy and rule has never been departed from or infringed upon, save by the application of what the court regarded as an inexorable rule of law, which upon thorough examination turns out to be a fiction. When that fact appeared, and the statute is the subject of construction wherein it is made to appear, it becomes controlling not only as an adjudication of the highest court of the land, but also as an adjudication of the

construction adopted by the courts of this State. It is not so much a difference of construction as it is of reason producing it, and when the reason for a given construction is shown to fail, and the policy of the statute is clear, the adjudication of the United States court becomes supreme and is made the law of the land with respect to the particular questions involved.

Under these circumstances, we think its rule must obtain, and so obtaining it necessarily follows that debts due within this State from solvent debtors, which are converted into money herein, and must of necessity be enforced in this jurisdiction, or not at all, become property within the meaning of the Transfer Tax Law, and as such are taxable." ¹

Matter of Gordon, 186 N. Y. 471-477; Matter of Page, N. Y. Law Journal, April 13, 1912, opinion quoted sub Chose in Action.

¹ Money, deposits in bank, stock, bonds, notes, credits or evidences of an interest in property and evidences of debt held by a non-resident decedent are not subject to tax if transferred since the amendment by Laws of 1911, chapter 732, in effect July 21, 1911; subdivision 2 of § 220 and § 243. For definition of intangible property vide Matter of Dusenbery, 2 State Department Reports, 501, opinion quoted, page 119.

1905.

MATTER OF ALBERT TILT, 182 N. Y. 557, affirms, without opinion, 107 App. Div. 616, which affirms, without opinion, order of surrogate; reversed in 207 U. S. 43, sub nom. Tilt v. Kelsey.

Testator died May 2, 1900. The United States Supreme Court say, page 46: "In the disposition of this case we are somewhat embarrassed by our ignorance of the reasons which controlled the decision of the highest court of the State. The opinion of the surrogate was very brief. His judgment was affirmed upon appeal successively by the Supreme Court and the Court of Appeals—in each court without an opinion and with two judges dissenting."

The testator at the time of his death, and for many years prior thereto, was a silk manufacturer in Paterson. Until 1888 he was a resident and citizen of Paterson. In that year he removed to New York City, became a resident and citizen of New York, and remained such until some time in the year 1899. For many years he had owned a house in New York City, where he lived during the greater part of the year, and another house

in Roxbury, New Jersey, where he lived during the summer and early autumn. His executors contended that in the last year of his life he changed his domicile from New York City to Roxbury and that at the time of his death he was domiciled in New Jersey. On the other hand, it was contended by the Comptroller of New York that his domicile continued until his death to be in New York. Upon this question the evidence was conflicting.

His will was admitted to probate in New Jersey. The court say, page 47: "An order was made fixing a time within which creditors must prove claims against the estate. On the expiration of this time a further order was made, that all creditors who had neglected to bring in their claims and demands should 'be forever barred from their action therefor against the executors of said deceased.' Succession taxes, imposed by the law of New Jersey and the law of the United States, and all debts, were paid. The executors presented their accounts to the Orphans' Court of the county, and that court, acting within its jurisdiction, on June 20, 1901, allowed the accounts and directed the distribution of the estate, according to the terms of the will. The executors made the distribution in conformity with the court's order, thereby parting with all the property of the testator which had been in their hands. After the distribution had been accomplished the State of New York for the first time made known its claim for a transfer tax."

The New York transfer tax appraiser was appointed on August 16, 1901, and filed his report March 6, 1903, wherein he found that testator was a resident of New York City at the time of his death. Upon appeal to the surrogate it was agreed by counsel that the surrogate should determine on affidavits whether or not Albert Tilt was a resident of New York at the time of his death. The surrogate found as a fact that the decedent was a resident at the time of his death.

The court further say, page 50: "It is contended that no Federal question was properly and seasonably raised in the state courts. We think, however, that a right under the Constitution of the United States was specially set up and claimed by the executors, as required by § 709 of the Revised Statutes, and denied by the highest court of the State, and that therefore we have authority to re-examine the decision. It appears clearly in the paper entitled 'Appeal to the surrogate' that the executors relied upon the judicial proceedings in New Jersey as a defense to the assessment of the New York tax. They 'specially set up

and claimed' a right under those proceedings, though it was not in terms stated to be a right claimed under the Constitution. This, in the case of a judgment of the court of another State, has been held to be a sufficient compliance with the statute. *Great Western Telegraph Co. v. Purdy*, 162 U. S. 329; *Bell v. Bell*, 181 U. S. 175; *Andrews v. Andrews*, 188 U. S. 14, and see the remark of the Chief Justice in *Mutual Life Insurance Company v. McGrew*, 188 U. S. 291, 311. Moreover, while the surrogate still had the appeal under consideration and undecided, requests in writing were made to him which clearly and specifically set up the claim that the full faith and credit due, under the Constitution, to the judicial proceedings of the State of New Jersey forbade the assessment of the tax. These requests were entertained and the claim denied by the surrogate and an exception taken. Upon the record thus made an appeal was taken, and in the disposition of the appeal the Federal question was necessarily passed upon by the highest court of the State, whose decision, therefore, we may re-examine.

"That re-examination, however, must be confined to the single question whether by the assessment of the tax full faith and credit has been denied to the judicial proceeding of the State of New Jersey in violation of Article IV, § 1, of the Constitution.

"In the consideration of this question, the first inquiry which presents itself is whether the adjudication of the New Jersey court, that Tilt was at the time of his death a resident of New Jersey, was conclusive upon the State of New York, a stranger to the proceedings. If it was that is the end of the case, because then New York could not take the first step necessary to bring the estate within the provision of the tax law of that State. But upon principle and authority that adjudication, though essential to the assumption of jurisdiction to grant letters testamentary, was neither conclusive on the question of domicile, nor even evidence of it in a collateral proceeding. * * * Full faith and credit due to the proceedings of the New Jersey court do not require that the courts of New York shall be bound by its adjudication on the question of domicile. On the contrary, it is open to the courts of any State in the trial of a collateral issue to determine upon the evidence produced the true domicile of the deceased.

"But assuming that the New York court had the right to determine, and determined rightly, the domicile of the deceased, what

then? The grievance here is not the finding that Mr. Tilt died a resident of New York. It is the assessment, based upon that finding, of a transfer tax upon the legacies contained in his will. The real question in the case is whether the assessment of that tax by the State of New York is consistent with the full faith and credit required by the Constitution to be given to the judicial proceedings of another State. After the will had been allowed and letters testamentary had been issued by the New Jersey surrogate, the executors named in the will took possession of all the personal property of the testator (the real property not being concerned in this litigation) and began to administer it in accordance with the terms of the will and under the direction of the court. * * * A limit of time was fixed for the presentation of claims against the estate, at the expiration of which it was decreed that all creditors who had neglected to bring in their demands should be barred from any action thereon against the executors. * * * For the purpose of enabling the executors to distribute the estate with safety to themselves, in accordance with a common practice in the settlement of the estate of deceased persons, and under authority conferred by the laws of the State, the court, prior to the distribution, had decreed that all those who had neglected to bring in their claims should be 'forever barred from their action therefor against the executors of the deceased.' Upon these facts does the assessment of this transfer tax by the State of New York, by whose laws the tax thus assessed is made a lien on the property transferred and a personal obligation of the transferee and the executors (§ 222, now § 224, ch. 908, Laws of 1896), give the full faith and credit to which these judicial proceedings are entitled? The answer to this question depends upon the nature of the proceedings and their effect upon the rights of those persons who were not parties or privies to them. If they are binding upon such persons the State of New York may not levy a tax upon property which has been transferred free from the burden and impose a personal liability on the executors who have been declared forever exempt from all demands against the estate. The enforcement of the claim for such a tax against the property, against the distributees of the property, and against those who have distributed it, under the direction of the court, and with its assurance that no claims against them shall longer exist, is plainly inconsistent with the judicial proceedings by which the property has been administered. Is then the nature of the proceedings such that

they are binding not only upon those who were parties or privies to them, but upon all others as well?

“When the owners of property die, that property, under the conditions and restrictions of the law applicable, is transmitted to their successors named by their wills or by the laws regulating inheritance in cases of intestacy. For a suitable time it is essential that the property should remain under the control of the State, until all just charges against it can be discovered and paid, and those entitled to it as new owners can be ascertained. It is in the public interest that the property should come under the control of the new owners, after such delays only as will afford opportunity for investigation and hearing to guard against mistake, injustice, or fraud. It is the duty of the sovereign to provide a tribunal, under whose direction the just demands against the estate may be determined and paid, the succession decreed, and the estate devolved to those who are found to be entitled to it. Sometimes this duty is performed by conferring jurisdiction upon a single court and sometimes by dividing the jurisdiction among two or three courts. The courts may be termed ecclesiastical, probate, orphans', surrogate or equity courts. The jurisdiction may be exercised exclusively in one, or divided among two or more, as the sovereign shall determine. But somewhere the power must exist to decide finally as against the world all questions which arise in the settlement of the succession. Mistakes may occur and sometimes do occur, but it is better that they should be endured than that, in a vain search for infallibility, questions shall remain open indefinitely. As was said by Mr. Justice Bradley, speaking on this subject in *Broderick's Will*, 21 Wall. 503, p. 519: 'The world must move on, and those who claim an interest in persons and things must be charged with knowledge of their status and condition, and of the vicissitudes to which they are subject. This is the foundation of all judicial proceedings *in rem*.' It is therefore within the power of the sovereign to give to its courts the authority, while settling the succession of estates in their possession through their officers, the executors or administrators, to determine finally as against the world all questions which arise therein. * * *

“In ascertaining, on a writ of error to a State court, what credit is given to these judicial proceedings by the laws and usages of the State of New Jersey, we are limited to the evidence on that subject before the court whose judgment we are reviewing,

Hanley v. Donoghue, 116 U. S. 1; *Chicago & Alton Railroad v. Wiggins Ferry Co.*, 119 U. S. 615, 622. The only evidence upon this point was in an affidavit of an attorney and counsellor at law of that State. The evidence is meagre and not entirely satisfactory and conclusive. It was, however, uncontradicted. * * * In relying upon evidence of this kind we are quite aware that we may not ascertain with the precision which might be desired the credit which the State of New Jersey attaches to these judicial proceedings. But it is all that we can have. We think that we may safely infer from it that the order of the surrogate barring all creditors who had failed to bring in the demand from any further claim against the executors was binding upon all. It was an order which he had 'full and competent authority to make,' and it was one of the acts which could not be impeached collaterally. We think also that the jurisdiction to direct a final distribution means a distribution which shall be final, so far at least as any person having a demand against the estate is concerned. If we have discerned correctly the effect which New Jersey gives to these judicial proceedings, it is obvious that the assessment of this tax denies them full faith and credit in two respects: First, in seeking a part of an estate which has been finally distributed to those who were entitled to it under the will; and, second, in fixing a personal responsibility for the tax upon the executors who had been conclusively exonerated from such a liability."

The court further say (page 59), that the State Comptroller "might have attacked the jurisdiction of the New Jersey courts, and thus brought forward for consideration many important questions which, in the view we take of the case, need not even be stated. But there was no attempt, except in argument here, to deny the right of the New Jersey court to act upon the paper writing purporting to dispose of the estate of Tilt, and by admitting it to probate to convert it into an operative will. It is true that, as a basis of assessing transfer taxes, it was proved that Tilt was a resident of New York at the time of his death, a fact which would be relevant to the question of jurisdiction. But that fact was not proved or used for the purpose of invalidating the proceedings taken in probating the will and administering the estate. On the contrary, the taxes were based upon the provisions of the instrument, which derived all its authenticity as a will and all its capacity to transmit property from the judicial proceedings in New Jersey.

"It appears conclusively from the action taken in the New York Surrogates' Court that there was no attempt to declare the New Jersey proceedings void because they were taken without jurisdiction. In the appraiser's report it is said that the deceased had left a will 'which was duly admitted to probate in the Surrogate's Court of the county of Morris, State of New Jersey, and that letters testamentary were issued by said Surrogate Court.' The specific legacies and the disposition of the residue of the estate were then stated. The Surrogate, in assessing the taxes, assessed them specifically on the beneficiaries, giving their respective names and the values of the property they respectively took under the will. Two life estates and several remainders, created by the will, were valued appropriately and the taxes assessed accordingly. All this is utterly inconsistent with an attack upon the jurisdiction, and we need not consider whether it could have been made with success. * * *

"(Page 60.) For the foregoing reasons we think that the judgment below denied to the New Jersey proceedings the full faith and credit to which they were entitled by the Constitution and laws of the United States."

Vide *Matter of Cummings*, 142 App. Div. 377-386. Etiam *Matter of Sebastian D. Lawrence*, N. Y. Law Journal, February 15, 1913, in which Surrogate Fowler said, in part: "The decedent, who was a resident of Connecticut, died on the 28th day of May, 1909. An order assessing a transfer tax upon his estate was entered by this court on the first day of November, 1912, and the executors of the estate have appealed from that part of the order which assessed a tax upon the value of certain bonds which the appraiser reported as having been transferred by the decedent 'in contemplation of death, or intended to take effect at or after death.' At the time of decedent's death these bonds were in a safe deposit vault in the National Park Bank in this city. The executors contend that the bonds in question were the property of the persons whose names were written on the envelopes which were found with the bonds, that they did not form any part of decedent's estate, and that they were not given by decedent in contemplation of his death or as a gift intended to take effect at or after his death. The persons who allege that the bonds belonged to them and not to the decedent, were next of kin of decedent, as well as legatees under his will.

"The decedent's will was probated in Connecticut. An appeal having been taken from the decree admitting the will to probate, the parties interested in decedent's estate entered into an agreement which construed and modified certain provisions of the will, admitted that the bonds in question did not belong to decedent and provided that the appeal should be withdrawn. This agreement was duly confirmed by the Probate Court. It does not appear that at any time prior to the date of this agreement the

persons whose names were written on the envelopes attached to the bonds claimed that they were the owners of the bonds.

"The executors thereafter filed a preliminary accounting with the Court of Probate for the First Judicial District of New London, and the decree of the court, which was entered upon the consent of all the parties, contained a finding that these bonds at the time of the death of decedent, 'formed no part of the estate of said decedent, but were when deposited in said safe deposit box the property respectively of the persons with whose names they were marked, and were given to said persons respectively by said Sebastian D. Lawrence during his lifetime, and were not given to said persons or any of them in contemplation of the death of the said Sebastian D. Lawrence, or to take effect upon, at or after the death of said Sebastian D. Lawrence.'

"The first question, therefore, which must be determined by this court is whether the finding of the Court of Probate for the District of New London, Connecticut, as to the ownership of the bonds is binding upon this court. Section 1 of article 4 of the Constitution of the United States provides that 'full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State,' and § 905 of the Revised Statutes of the United States provides 'that the said records and judicial proceedings shall have such faith and credit given to them in every court within the United States as they may have by law or usage in the courts of the State from which they are taken.'

"No evidence was adduced before the appraiser to show what credit is given by the laws and usages of Connecticut to the decree of a probate court of that State entered upon an accounting by an executor. There was no proof that such decrees are held by the laws and usages of Connecticut as binding against the whole world. Therefore this matter does not come within the decision in *Tilt v. Kelsey* (207 U. S. 43).

"It has been held that the courts of probate in Connecticut are courts of special and limited jurisdiction (*Potwines' Appeal*, 31 Conn. 381); that their decrees may be attacked collaterally for want of jurisdiction, and that they cannot conclusively determine the facts giving them jurisdiction, whether those facts be *quasi* jurisdictional or otherwise (*Sears v. Terry*, 26 Conn. 273).

"When the judgment of such a court is relied upon it is incumbent upon the person asserting a right thereunder to prove that the court had jurisdiction of the subject-matter, that the law authorized the rendition of such a judgment, and that the steps taken to acquire jurisdiction both of the person and the subject-matter were duly had and taken according to the law under which the judgment was assumed to be rendered. (*Matter of Law*, 56 App. Div. 454).

"In the proceeding before the transfer tax appraiser the executors relied upon the judgment of the Probate Court of Connecticut, but they did not prove that that court had jurisdiction to render a judgment in an accounting proceeding determining the ownership of personal property as between the representatives of the decedent, and those claiming by title adverse to the decedent. In the absence of such proof this court is not bound by the decree of the Probate Court of Connecticut.

"It appears to me that in order to bind the State Comptroller of the State

of New York by the judgment of the Probate Court of Connecticut he should have been made a party to the proceeding. He had an interest in the proceeding to the extent of the transfer tax that could be imposed by this State if it were found that the bonds belonged to the decedent. If the title to property ostensibly belonging to a decedent, but claimed after his death by other persons, could be determined by the agreement of the parties between themselves and without notice to the State Comptroller the transfer tax statute could be successfully evaded and its provisions nullified. Therefore, in order to make such a determination binding upon the State Comptroller, he should be made a party to the proceeding.

"The record of the Probate Court of Connecticut admitted in evidence before the appraiser shows that the State Comptroller of the State of New York was not a party to the agreement by which the ownership of the bonds was admitted to be in Nanine Lawrence Pond, Josephine B. Lawrence, Ethel K. Lawrence and Edward R. True, Jr.; that no notice was served upon him of the proposed accounting of the executors, and he was not a party to the proceeding by which the Court of Probate found that the bonds did not belong to the decedent at the time of his death. Therefore the State Comptroller of the State of New York is not bound by the decree of the Probate Court of Connecticut (*Bartlett v. Spicer*, 75 N. Y. 528; *Rogers v. Adriatic Fire Ins. Co.*, 148 N. Y. 34; *Smith v. Century Trust Co.*, 154 N. Y. 335; *Matter of Kimball*, 155 N. Y. 63; *Pennoyer v. Neff*, 95 U. S. 714; *Haddock v. Haddock*, 201 U. S. 562). The right of the State of New York to a transfer tax could not be affected by a proceeding in another jurisdiction to which the State of New York was not a party (*Matter of Cummings*, 142 App. Div. 377). Besides, the decree of the Probate Court of Connecticut was not made upon controverted pleadings or issues presented to the court for adjudication, but upon an agreement entered into between the parties.

"No question as to the ownership of the bonds having been litigated before the court, and, therefore, no judgment upon the merits of any conflicting claims having been rendered by it, its decree cannot prevent this court from inquiring into the validity of the title of those claiming ownership of the bonds or determining upon general principles of law the respective rights of the different parties to the bonds in question (*Reynolds v. Stockton*, 27 Abb. New Cas. 112; *Texas & Pac. R. R. v. Southern Ry.*, 137 U. S. 48; *Lawrence Mfg. Co. v. Janesville Mills*, 138 U. S. 552).

"It therefore appears that this court may, notwithstanding the decree of the Court of Probate of Connecticut, inquire into the ownership of the bonds located in this county at the time of decedent's death, and determine that question in so far as the right of the State of New York to a transfer tax is dependent upon such determination."

Vide *post*, page 701, for that portion of the opinion in the Lawrence case, *supra*, relating to ownership of the bonds.

For discussion of question of domicile vide opinion of Surrogate Fowler in *Matter of Grant*, N. Y. Law Journal, December 9, 1913; etiam *Matter of Grant*, *id.*, November 14, 1913, opinion quoted, *post*, page 833.

1905.

MATTER OF POTTER PALMER, 183 N. Y. 238.

Testator died a resident of Illinois in 1902, and a portion of his estate consisted of stock in N. Y. Central and H. R. R. R. Co. The estate contended that the tax should only be "upon that proportion of the capital and assets of the company employed within the State of New York." That is to say, because it was made to appear that about 36 per cent of the corporate capital was invested in properties without the State, it was argued that the appraisement of the value of the capital stock, in this proceeding, should have been proportionately less.

The court say, page 240: "The basis for this claim is the proposition that the corporation itself is not taxable by the State upon its investments in railroad properties situated outside of the State, under the provisions of § 182 of the General Tax Law, which impose an annual franchise tax upon the corporation, measured by the amount of the capital stock employed within the State. (*People ex rel. N. Y. C. & H. R. R. R. Co. v. Knight*, 173 N. Y. 255.)

"The error in the argument is in assuming that the assessment of the corporate franchise for taxation purposes proceeds upon the same principle upon which the interest of the holder of capital stock is taxed. The franchise tax, which is assessed against the corporation is to be computed upon the value of property within the State, in which the corporate capital is invested. (*People ex rel. U. S. A. P. P. Co. v. Knight*, 174 N. Y. 475; *People ex rel. N. Y. C. & H. R. R. R. Co. v. Knight*, *supra*.) The assessment of the stockholder, however, is computed upon the value of his interest in the whole of the corporate property, as evidenced by the number of the shares of stock, which he holds. Their market value may, or may not, represent, proportionately, the actual value of the corporate properties. Very often it does not and the market value of the shares of capital stock may be quite disproportionately influenced by considerations, or by circumstances, having little reference to actual conditions. That value, whatever it may be in the market, is the worth attached to an interest in the corporate assets and properties, regarded as a whole. * * *

"(Page 241.) The Transfer Tax Act operates upon that general right to succeed to the interest of the deceased in the corporation, and it is inconceivable that the value of the interest,

upon which the tax is computed, is determinable by the location of the corporate properties."

As to corporations incorporated in New York and in other States, vide *Matter of Cooley*, 186 N. Y. 220; *Matter of Thayer*, 193 N. Y. 430; as to joint stock associations, *Matter of Wilmer*, 153 App. Div. 804.

Matter of Ames, 141 N. Y. Supp. 793-795. Intangible property held by non-resident decedent is not taxable if transferred since amendment by Laws of 1911, chapter 732, in effect July 21, 1911; subdivision 2 of § 220 and § 243.

1906.

MATTER OF JOHN W. DAVIS, 184 N. Y. 299.

The court say, page 301: "As the order of the Appellate Division is silent as to the grounds on which it was made, it must, under § 1338 of the Code of Civil Procedure, be presumed that the decree of the surrogate was reversed on questions of law only, and if there was any evidence to sustain the finding of the surrogate in favor of the appellant, the order of the Appellate Division was erroneous. (*Matter of Keefe*, 164 N. Y. 352.) We think the evidence was ample to justify the finding of the surrogate. The facts, tersely stated, are as follows: The appellant was a niece of the testator's wife and was born on January 31, 1866. Her mother died November 12, 1872, whereupon her aunt, Mrs. Davis, took the appellant from her father's home to her own, where the appellant continued to live as a member of the testator's family till his death on January 11, 1903, a period of over thirty years. During her infancy, the appellant was supported and maintained at the expense of the testator and was subject exclusively to his control and that of his wife, the father in no respect contributing to the appellant's support nor exercising any direction over her."

The question involved was whether legatee sustained to the testator the relation, to use the words of statute, of a "child to whom any such decedent * * * for not less than ten years prior to such transfer stood in the mutually acknowledged relation of a parent, provided, however, such relation began at or before the child's fifteenth birthday and was continuous for said ten years thereafter." The court held that she did, saying, page 303: "It is objected that the appellant did not address her uncle and aunt as father and mother, nor they call her daughter. This is of but slight importance. To give effect to it, would be to sacrifice conduct and acts to appellations which

are often the result of accident. Had the appellant been an entire stranger both in blood and affinity, it is probable that she would have called the testator and his wife father and mother, but still other terms denoting affection might have been used. Being, however, the niece of the parties (of the testator by marriage), it was more natural that she should continue to call them uncle and aunt than that she should adopt a new term."

Vide subdivision 1 of § 221a. Matter of Deutsch, 107 App. Div. 192, appeal withdrawn and surrogate's order affirmed after above decision. Matter of McMurray, 96 App. Div. 128; Matter of Birdsall, 22 Misc. 180-187, affirmed, without opinion, 43 App. Div. 624.

Beneficiary is a competent witness, vide Matter of Brundage, 31 App. Div. 348-353, and cases cited, *post*, page 855.

1906.

MARY E. JACKSON v. ROBERT W. TAILER, AS EXECUTOR, ETC., 184 N. Y. 603, affirms, without opinion, 96 App. Div. 625, which affirms, on opinion below, 41 Misc. 36.

This was an action for the construction of a will. The testatrix died a resident. The plaintiff, one of the legatees, claimed that she was entitled to receive the whole legacy left to her, and that the transfer tax should be paid out of the residuary estate.

The surrogate in directing judgment against the plaintiff said, page 37: "The clause of the will upon which she relies is applicable to all the legacies except that of the residuum, and reads as follows: 'I do hereby further authorize and empower my said executors, in his or their discretion, to pay any or all of the aforesaid legacies within one year after my decease without any rebate or reduction whatever.' It was left entirely optional with the executor whether or not he would anticipate the time fixed by statute for the payment of legacies, and the provision that such payment should be without rebate or deduction seems to have been intended to take effect only if he should so exercise his discretion as to anticipation of payment. It doubtless would justify the executor, if he anticipated payment, in waiving the usual rebate of interest. The clause can hardly have been intended to apply to a succession or legacy tax because the will was executed on February 15, 1884, more than a year before

the first act was passed in this State imposing a tax on legacies or successions. It is true that the will was generally reaffirmed by a codicil executed after the passage of the act, but that mere reaffirmation cannot throw any light upon the intention of the testatrix at the time the clause in question was framed. Apart from this consideration, in my opinion, the words used by the testatrix would not have the effect claimed for them by plaintiff, even if the will had been executed after the passage of the act imposing the tax.

"It is well settled that the tax in question is not a tax upon the estate or legacy bequeathed or devised, but is a tax imposed upon the legatee for the privilege of succeeding to the property. *Matter of Gihon*, 169 N. Y. 443. Therefore, although the executor is required to pay the tax, he pays it, not for account of the estate, and as a deduction from the legacy, but on account of the legatee upon whom the tax is imposed.

"In legal effect the result, as between the estate and the legatee, is precisely the same as if the legacy were to be paid over to the legatee intact, and then the tax was to be collected from him. It is merely for the convenience of the State, and to insure certainty of collection that the duty is cast upon the executor of paying the tax. Strictly speaking, therefore, the tax is not a 'rebate or deduction' from the legacy. Doubtless a testator may, by apt words, direct that the tax upon a particular legacy or class of legacies should be paid out of the residuary estate, but as pointed out by the Court of Appeals in the case above cited, such a provision would simply amount to an increase of the legacy by the amount of the tax."

Isham v. N. Y. Association for the Poor, 177 N. Y. 218; *Matter of Smith*, 80 Misc. 140-143; *Matter of Samuel Myers*, N. Y. Law Journal, November 22, 1913, opinion quoted, *supra*, page 759.

1906.

MATTER OF JOSEPH STICKNEY, 185 N. Y. 107, writ of error dismissed in 209 U. S. 419, sub nom. *Stickney v. Kelsey*.

Chapter 41, Laws of 1903, held to be valid, reference to the journals of the two houses establishing that there was present in each house of the legislature the requisite number of members, to wit, two-fifths.

The United States Supreme Court say: "We do not intend to intimate that, if the words of the opinion were capable of the meaning which is attributed to them in this assignment of error, there would have been shown any violation of the Fourteenth Amendment. *League v. Texas*, 184 U. S. 156. But we think, in view of the fact that when the copies of the journals were offered in evidence no objection had been made that the originals were not produced, the language of the court may quite as naturally be interpreted as a declination to pass on a question, not necessary to the decision, which had been set at rest for the future by legislation. The best that can be said for the plaintiffs in error is that the action of the court was ambiguous. We resolve the ambiguity against the parties complaining, who are bound to show clearly that a Federal right was impaired, rather than misuse our ingenuity to spell out a Federal question to aid a defense which is merely technical and destitute of substantial merit.

"It does not therefore appear that the judgment under review was based upon the decision of any Federal question. *Bachtel v. Wilson*, 204 U. S. 36."

Vide *Scudder v. Comptroller*, 175 U. S. 32, dismissing writ of error; *Matter of Houdayer*, 150 N. Y. 37.

1906.

MATTER OF MARY A. WEEKS, 185 N. Y. 541, affirms, without opinion, 109 App. Div. 859.

Involves same question as *Matter of Stickney*, 185 N. Y. 107.

1906.

MATTER OF SIMEON G. CURTICE, 185 N. Y. 543, affirms, without opinion, 111 App. Div. 230.

The sole complaint of estate was that too high a valuation had been placed upon certain stock of decedent. The court say, page 231: "The specific property involved is 3,737 shares of the common, and 2,025 shares of the preferred, capital stock of Curtice Brothers Company, and which has been appraised at \$110 and \$107.50 per share. It is claimed that said valuations should not have exceeded \$80 and \$90 per share respectively.

While the determination of the values of these stocks must be more or less a matter of speculation, I think that a valuation of the preferred stock at \$97.50 and of the common stock at \$100 per share will be nearer correct for the purposes of this proceeding than that adopted by the learned surrogate.

"Curtice Brothers Company was a private family corporation, engaged in manufacturing catsups, jellies, etc., and having its principal place of business in Rochester. The entire capitalization of the company consisted of 7,000 shares of preferred and 8,000 shares of common stock. The active manager of the company was a brother of the deceased. The company had been in existence four or five years and had paid dividends at the rate of ten per cent per annum upon the common, and of seven per cent per annum upon the preferred.

"The stock, as might be expected, was an inactive one. It does not appear to have been listed or dealt in upon any stock exchange or market other than the local one at Rochester. A few scattering sales had been reported at the latter during the year or more preceding decedent's death, and immediately after his death there was a bid quotation of \$110 per share for the common and a reported sale upon the exchange sheet of ten shares of the preferred at \$107.50, and which figures were adopted by the surrogate. Outside of one sale of fifty shares at 105½ there is no evidence of any sale of or quotation upon a larger lot of stock than ten or twenty shares. Only two witnesses were sworn as to the value of the stock, and they seem to have been entirely familiar with the limitations of the market for it, and with the conditions and considerations which would fix its value. They agreed that the fair market valuations would be for the preferred ninety and for the common eighty. Upon cross-examination they referred to the sales of occasional small lots at the higher prices already mentioned, and accounted for the difference between such prices and the valuations fixed by them by and upon the theory in substance that while small lots could be sold for the higher prices, there would not be a demand which would absorb in any reasonable time the large amount held by decedent's estate at such prices.¹

"It is urged by the learned counsel for the respondent that this theory is hypothetical and speculative, and that it should yield to the concrete fact that some of the stock has actually been sold or bid for at the prices adopted by the surrogate. But in my judgment the fact referred to is not wholly applicable

to or controlling of the conditions and questions now presented to us.

"The basic issue to be determined by the surrogate was what was the 'clear market value,' the 'fair market value' of 3,737 shares of the common and of 2,025 shares of the preferred stock in question, for purposes of taxation, with a reasonable time and under fair opportunities for purchase. The executors would not be justified in recklessly and precipitately throwing the stock upon the market in such a manner as would inevitably invite sacrifice. Neither should they be compelled to occupy an indefinite time in the attempt to peddle the stock out in ten-share lots.

"It must be apparent at once that the question thus presented under the circumstances of this case is a very different one from that of the prices obtained for a few small lots from time to time, and mostly before any possible complications were suggested by the death of decedent.

"The only witnesses sworn testified positively that there would not be a market for such a large amount at the higher prices, and that the valuations named by them would be a fair market price.

"It is true that that is an opinion merely, but it is the opinion of conceded experts who are not contradicted, except by the record of the sales already referred to. Moreover, ordinary observation and judgment tends to confirm their opinion, at least to some extent.

"Here was a total holding of stock of the par value of \$576,200 out of a total capitalization of \$1,500,000. Yet while it represents a very large amount, it was still a minority holding in a private corporation controlled by the family to which decedent had belonged. The stock was closely held. There was no general and public ownership of it or market for it, and while an investor might be willing to take a small amount at a high price, possibly determined by dividends, it does not follow that there could be found to absorb so large an amount either a sufficient number of small purchasers or large purchasers, who would be willing to invest so large a sum which still would not give them control, but leave them more or less at the mercy of a united family. It needs no extended argument to show that the sale of this large minority block of stock in a comparatively small concern upon a local and restricted market, is entirely different from that of a sale of much larger amount of the stock of a large

and public corporation in a broad and general market like the New York Stock Exchange. It must be more or less a matter of opinion and even of conjecture what could be obtained for it. But what I do feel very certain of is, that the price obtained for a few little lots is not a fair measure of valuation for the large amount involved in these proceedings, and that the valuation suggested of par for the common and eighty-seven and one-half for the preferred is quite liberal in view of all the attendant contingencies. No evidence was given as to the intrinsic value of the stock outside of the fact that it paid certain dividends. We may, however, take judicial notice of the fact that the value of industrial stocks often does not bear close apparent relations to the rate of dividends which they may happen to pay at a given time, and the latter is not by any means a controlling gauge of values. (Matter of Smith, 71 App. Div. 605.) * * *

"Page 233: Chapter 34 of the Laws of 1891, (§ 122, Decedent Estate Law) provides that 'Whenever * * * it shall become necessary to appraise in whole or in part the estate of any deceased person * * * the persons whose duty it shall be to make such appraisal shall value * * * all such property, stocks, bonds, or securities as are customarily bought or sold in open markets in the city of New York, or elsewhere, for the day on which such appraisal or report may be required by ascertaining the range of the market and the average of prices as thus found, running through a reasonable period of time.'

"Assuming that this statute might be applicable to such an appraisal as this, I think it quite apparent that it is not controlling here. The evidence does not disclose any such free or customary market dealings in the stock in question as fairly to bring it within the scope of this statute." ²

Held, that order of surrogate be modified by fixing the value of the preferred stock at \$97.50 and the common at par.

Matter of Cook, 114 App. Div. 718-721, reversed on other point in 187 N. Y. 253.

¹ Matter of Chappell, 151 App. Div. 774; Matter of Cook, 50 Misc. 487-493, modified on another point in 187 N. Y. 253; Matter of Bach, N. Y. Law Journal, November 21, 1911, opinion quoted, *post*, page 617; Matter of Rees, 208 N. Y. 590, *post*, page 392.

² Matter of Chambers, *id.*, January 31, 1912, opinion quoted, *post*, page 627; Matter of Crary, 31 Misc. 72-73, and other cases cited sub *Closely Held Stock*.

1906.

MATTER OF GEORGE BACKHOUSE, 185 N. Y. 544,
affirms, without opinion, 110 App. Div. 737.

Edward T. Backhouse died before 1885, and by his will left one-fifth of his property in trust to his son, George Backhouse, for life, remainder to his said son's heirs, "or to such person or persons as such child may appoint in his * * * last will and testament." The son George Backhouse died in 1904, leaving a will by which he appointed his children who were his heirs, to take the remainder under said will of Edward T. Backhouse. In the transfer tax proceeding in his estate the appraiser proceeded to tax not only the transfer of the property of George Backhouse but also the remainder under the trust created by Edward T. Backhouse. The appraiser gave notice to the children, but they did not appear.

Justice Gaynor in giving the opinion of the court, said, page 739: "The children of George Backhouse get the one-fifth of the estate of their grandfather by his will and not by the will of their father. It vested in them when the grandfather's will took effect (Matter of Lansing, 182 N. Y. 238). It follows that it was not subject to a transfer tax, for the Transfer Tax Law had not yet been passed when it vested in them.

"The surrogate had power to modify his decree, and should have done so, first, because the said children were not bound by it in so far as it imposed the tax in respect of the property they took under their grandfather's will, for they were only notified of an appraisal of their father's estate, and that was therefore the limit of the jurisdiction of the appraiser and surrogate on their default;¹ second, because the surrogate's jurisdiction being limited to transfers covered by the statute, he had no jurisdiction to impose the tax; and, third, because at most it was a mistake all around (Matter of Scrimgeour, 175 N. Y. 507).² That in this Scrimgeour case the tax was imposed under an unconstitutional provision of the statute (a fact which the blind report of the case conceals) does not distinguish it from the present case. In each case there was no statute for what was done.

"There is no evidence that the said heirs ever elected to take under the appointment, if it can be called such, of their father's will, or if such election could be made."

¹ Second paragraph of § 230. Matter of Winters, 21 Misc. 551; Matter of Bolton, 35 Misc. 688; Matter of Wolf, 137 N. Y. 205-213, etiam *supra*, page 79.

²Matter of Scott, 208 N. Y. 602, *post*, page 396, and cases cited sub Vacating Decree.

Matter of Smith, 150 App. Div. 805-808; Matter of Warren, 62 Misc. 444-448. Vide cases cited sub Power of Appointment.

1906.

MATTER OF FRANCIS B. COOLEY, 186 N. Y. 220.

Testator died a resident of Connecticut on November 25, 1904, owning stock in the Boston and Albany Railroad Company which the transfer tax appraiser assessed at its market value.

The court say, page 223: "The Boston and Albany Railroad Company is a consolidation formed by the merger of one or more New York corporations and one Massachusetts corporation. The merger was authorized and the said consolidated corporation duly and separately created and organized under the laws of each State. There is but a single issue of capital stock representing all of the property of the consolidated and dual organization. Of the track mileage about five-sixths is in Massachusetts and one-sixth in New York. * * *

"(Page 227.) Double taxation is one which the court should avoid whenever it is possible within reason to do so. * * *

"The law of taxation is to be construed strictly against the state in favor of the tax-payer as represented by the executor of the estate. * * * No doubt is involved, as it seems to me, about the meaning and application of the statute. The decedent's stock was 'property within this state,' which had its situs here as being held in the New York corporation and the transfer of it was taxable here. There can be no dispute about that. The question is simply over the extent and value of his interest as such stockholder, in view of the other incorporation in Massachusetts. I see nothing in the statute which prevents us from paying decent regard to the principles of interstate comity and from adopting a policy which will enable each state fairly to enforce its own laws without oppression to the subject. This result will be attained by regarding the New York corporation as owning the property situate in New York and the Massachusetts corporation as owning that situate in Massachusetts, and each as owning a share of any property situate outside of either state or moving to and fro between the two states, and assessing decedent's stock upon that theory. That is the obvious basis for a valuation if we are to leave any room for the

Massachusetts corporation and for a taxation by that state similar in principle to our own without double taxation. * * *

“(Page 229.) We are not apprehensive lest, as suggested, New York corporations may take out incorporation in other states for the purpose of exempting transfers of their capital stock from taxation under the principles of this decision. We do not regard our decision as giving encouragement to any such course. It is based upon and limited by the facts as they are here presented, and there is no question whatever but that the Boston and Albany Railroad, in good faith, and for legitimate reasons, was equally and contemporaneously created both as a New York and a Massachusetts corporation. It can no more be said that being originally and properly a New York corporation it subsequently and incidentally became a Massachusetts one than could be maintained the reverse of such proposition. If in the future a corporation created and organized under the laws of this state, or properly and really to be regarded as a New York corporation, shall see fit either for the purpose suggested, or for any other reason subsequently and incidentally and for ancillary reasons, to take out incorporation in another state, a case would arise not falling within this decision. * * *

“(Page 231.) Lastly, it is urged, that there will be great practical difficulty in making an apportionment of property for the purposes of valuation and taxation upon the lines suggested, and the learned counsel for the respondent has suggested many difficulties and absurdities claimed to be incidental to such course of procedure. Most of them certainly will not arise in this case and they probably never will in any other. Of course an appraisal based upon an apportionment of the entire property of the consolidated company between the New York and Massachusetts corporations may be made a source of much labor and expense if the parties so desire. Possibly it might be carried to the extent of a detailed inventory and valuation of innumerable pieces of property. Upon the other hand, an apportionment based upon trackage or figures drawn from the books or balance sheets of the company may doubtless be easily reached which will be substantially correct and any inaccuracies of which when reflected in a tax of one per cent upon 426 shares of stock will be inconsequential.”

Prior to amendment of §§ 220 and 243 by Chapter 732, Laws of 1911, in effect July 21, 1911, in estates of non-residents, stock in B. & A. R. R. was taxed on 1837/10000 basis.

Matter of Palmer, 183 N. Y. 238; Matter of Thayer, 193 N. Y. 430; Matter of Wilmer, 153 App. Div. 804.

As to transfers in non-resident estates made since the 1911 amendment, vide *supra*, page 133.

1906.

MATTER OF LEONARD J. GORDON, 186 N. Y. 471.

Testator died a resident of New Jersey on January 17, 1905. The decedent died seized of no real property in this State, but left certain personal property here, the value of which was appraised in this proceeding. At the time of his death the testator had a policy of life insurance in the Equitable Life Assurance Society. The court say, page 482: "In conclusion we might say that we are unable to contemplate with a confidence born of great optimism the results which would follow from the adoption and enforcement of the doctrine urged by appellants. If the contract in this case is subject to the imposition of a transfer tax, then any contract of insurance issued to a non-resident, passing to and held by his non-resident representatives or assigns, and being administered and enforceable in a foreign jurisdiction, whether in the state of Texas or California, or in some foreign country, would afford the basis of taxation in this state, provided only the policy was issued by a New York corporation and access could be obtained by the tax collector to its proceeds. No distance of domicile of the assured and his transferees or beneficiaries, and no completeness of foreign jurisdiction over administration and enforcement, and no lack of anticipation of such a result upon the part of the assured, would be a bar to the attempted application of the taxing power. It requires no great imaginative processes to picture the limits and disapproval and friction to which this theory would lead if logically carried to its full length.

"It was undoubtedly the intent of the legislature that the statute under consideration should be liberally construed to the end of taxing the transfer of all property which fairly and reasonably could be regarded as subject to the same, and this court has unequivocally placed itself upon record in favor of construing the statute in the light of such intent. But the proposition now propounded, if adopted, would lead far beyond any point which has thus far been reached, and we do not believe that it would be wise or practicable to adopt it."

Vide subdivision 2 of §§ 220 and 243. Matter of Rhoads, 190 N. Y.

525; *Matter of Abbett*, 29 Misc. 567; *Matter of Horn*, 39 id. 133; *Matter of Gibbs*, 60 id. 645; *Matter of Page*, N. Y. Law Journal, April 13, 1912, opinion quoted *sub Chose in Action*.

As to life insurance on life of resident, *Matter of Knoedler*, 140 N. Y. 377; *Matter of Elting*, 78 Misc. 692; *Matter of Parsons*, 117 App. Div. 321. As to gratuity fund *vide Matter of Fay*, 25 Misc. 468.

1906.

MATTER OF GEORGE T. HANFORD, 186 N. Y. 547, affirms, without opinion, 113 App. Div. 894, which affirms, without opinion, order of Supreme Court Justice, granted without opinion.

Testator died a resident March 12, 1902. Transfer tax proceedings were held and the transfer to the respondent Laura H. Briggs was taxed at five per cent, and the tax was paid at that rate. Thereafter, the Appellate Division reduced the tax from five to one per cent. The comptroller offered to refund the difference in the tax but the respondent insisted that she was entitled to interest, and instituted this proceeding to compel the comptroller to pay interest.

A peremptory mandamus was granted by the Justice of the Supreme Court sitting at a Special Term in Albany, which directed that the comptroller pay interest.

Vide § 225. *Vide* footnote, page 290, *Matter of O'Berry*, 179 N. Y. 285.

1906.

MATTER OF EMILY M. LORD, 186 N. Y. 549, affirms, without opinion, 111 App. Div. 152; sustained in 211 U. S. 477, *sub nom. Beers v. Glynn*.

The husband of testatrix died a resident of New Jersey January 8, 1892, and his will was duly admitted to probate in that State. Ten days after his death and before the probate of his will, testatrix died a resident of New Jersey. By his will he gave all of his estate to his wife, Emily M. Lord, and he also exercised the power of appointment of certain property held by trustees in favor of his wife. Edward C. Lord, the husband, owned no real property within this State, and as the statute at that time provided no means of assessing and collecting a tax upon property of a non-resident not owning real estate within

this State the transfer of his property was not taxable. (Matter of Embury, 19 App. Div. 214; affirmed on opinion below, 154 N. Y. 746.)¹

The testatrix owned real estate situated in the State of New York and its transfer was taxed in a proceeding brought several years prior to the present proceeding (folio 13 of printed papers on appeal to Court of Appeals).

After the will of Edward C. Lord had been admitted to probate in the State of New Jersey, the surviving executor took the property of the decedent that was within this State to the State of New Jersey. The estate of Emily M. Lord was then administered in the State of New Jersey and subsequently distributed. Thereafter in September, 1901, the Comptroller of the State of New York, alleging that the decedent was seized of personal property in the State of New York at the time of her death, applied to the surrogate to designate an appraiser to appraise the personal property of the decedent within this State, only the real estate having been taxed in the first proceeding. This second proceeding resulted in an order taxing the legatees under the last will and testament of Emily M. Lord, deceased, and from that order two of the beneficiaries appeal.

The court say, page 153: "There are three separate funds involved. First, a trust fund created by a trust deed of March 13, 1873, the income thereof to be paid to Edward C. Lord during his life, with the power to dispose of the corpus of this fund by a last will and testament. By his last will and testament Edward C. Lord exercised this power in favor of his wife, and by this exercise of the power of appointment the title to this trust fund vested in her and passed under her will. Second, a trust created by the will of Susan Lord, who died in 1880, the income of which was to be paid to Edward C. Lord during his life, with a power of appointment of the remainder after his death. This he exercised in favor of his wife, the decedent, and that property thus vested in her and passed under her will. And, third, the property bequeathed by Edward C. Lord to the decedent, his wife, which was subsequent to her death realized by the executor of Edward C. Lord, and the proceeds of the property paid by him to the executors of Emily M. Lord.

"There is a distinction between the liability to taxation of the property acquired by the testatrix by the power of appointment contained in the will of her husband and the property that her estate received directly under her husband's will. The property

that the estate of the testatrix received as the appointee of the power vested in her husband consisted of the first and second classes as before stated, and will, therefore, be considered separately from the third class of property acquired by the executors of the testatrix as property bequeathed to her by her husband. The property under the first trust created in 1873 was appraised by the appraiser at the value of \$5,970, and the property constituted by the trust of Susan Lord in 1880 was appraised at \$92,840.98. At the time of Edward C. Lord's death this property was held by trustees who were residents of this State, and the property was in this State. Upon the exercise of the power of appointment by Edward C. Lord the title to that property vested absolutely in his wife, her title relating back to the deed and will creating the trusts, and immediately upon the death of Edward C. Lord the title of the testatrix became absolute in the trust property. The property constituting these trust funds that was in this State at the time of her death and which was transferred by her last will, was clearly taxable under chapter 483 of the Laws of 1885, as amended by chapter 713 of the Laws of 1887, and chapter 215 of the Laws of 1891, in force at the time of the death of the testatrix. I, therefore, agree with the court below that the property thus held by the trustee within this State as the property of the testatrix was taxable. As to the property of Edward C. Lord, which under his will passed to the decedent, and which under her will passed to her legatees, a different question is presented. * * *

"There can be no question but that certain personal property which belonged to her husband was at the time of his death within this State, and was not removed from this State until after the death of Mrs. Lord. Upon the death of Edward C. Lord, Mrs. Lord became entitled under his will as residuary legatee to all of his property. * * *

"(Page 157.) As was said by Judge Vann in *Matter of Houdayer* (150 N. Y. 41): 'A reasonable test in all cases, as it seems to me, is this: Where the right, whatever it may be, has a money value and can be owned and transferred, but cannot be enforced or converted into money against the will of the person owing the right without coming into this State, it is property within this State for the purposes of a succession tax.'

"If this is the crucial test it would seem that this claim against the estate of an executrix appointed in the State of New Jersey was never property within this State, no matter where the prop-

erty was located which constituted the estate of Edward C. Lord. Under this decision, if Mr. Lord had been a resident of this State, or if a mode had been provided for assessing the value of his personal property at the time of his death, his personal property which was in this State would have been taxable.² The right that Mrs. Lord had in his estate, however, was not a right to the particular personal property which Mr. Lord had, but a right to the balance of the proceeds of Mr. Lord's property after the payment of his debts and the expense of administration of his estate. That right at the death of Mrs. Lord was solely a claim against the executor of Mr. Lord's estate and was not, therefore, as I view it, property within this State at the time of the death of Mrs. Lord."

The executor refused to answer questions "regarding" property of decedent on the ground "that to answer the question would submit me to a forfeiture or penalty" (folio 129 of printed papers on appeal). Surrogate Thomas held (N. Y. Law Journal, July 9, 1902) that the second sentence of § 837 of the Code of Civ. Pro. did not apply, and that the executor should answer.³

¹ Vide *Matter of Clinch*, 44 Misc. 190, affirmed, 180 N. Y. 300, a case where the decedent died after the amendment, chapter 399, Laws of 1892, which remedied the jurisdictional defect of the statute re non-resident estates. Section 228.

² Etiam *Matter of Keeney*, 194 N. Y. 281-286; *Matter of Fearing*, 200 N. Y. 340-344; *Matter of Armstrong*, N. Y. Law Journal, February 20, 1912, opinion quoted sub *Legacy*, page 733. Vide subdivision 2 of § 220 and § 243, amended by Laws of 1911, chapter 732, in effect July 21, 1911.

³ *Matter of David Kennedy*, 113 App. Div. 4-9; *Matter of Bishop*, 82 App. Div. 112.

1906.

MATTER OF WAGER J. HULL, 186 N. Y. 586, affirms, without opinion, 111 App. Div. 322, which reverses 47 Misc. 567.

Caroline C. Hull died a resident January, 1874, and by her will bequeathed to her son, Wager J. Hull, the life income in four-thirteenths of her property, with a power of appointment as to the principal of said fund.

At the death of said Caroline C. Hull, the said four-thirteenths of her estate consisted of an undivided interest in real estate belonging to her father, Richard M. Cooper, a resident of the State of New Jersey, but for a long time subsequent to her death

the said four-thirteenths of her estate had been converted into cash and had remained in that form, or had been invested in bonds and mortgages on property in New Jersey. Wager J. Hull died a resident April 5, 1902, and exercised the power of appointment in favor of his wife Ida M. Hull.

The appraiser taxed the transfer of the property, and the surrogate reversed the decree affirming the report. The court say, page 324: "We are of opinion that the learned surrogate has fallen into error in reversing the original decree in this matter, due to the confusion of the question by an entirely irrelevant detail in relation to the situs of the property which passed to said Ida M. Hull. The question is not where the property was located, or whether it was real estate or personal property, but whether the beneficiary came into its possession through the exercise of a privilege conferred by the State of New York. * * *

"(Page 326.) Ida M. Hull gets all of her rights in and to the property by reason of the exercise of the power, a privilege granted by the State of New York, and she may not be relieved from that obligation because of the fact that the property itself was without the jurisdiction of the State at the time the power was exercised."

Vide subdivision 6 of § 220. *Matter of Kissel*, 65 Misc. 443-445, affirmed, without opinion, 142 App. Div. 934; *Matter of Fearing*, 200 N. Y. 340; *Matter of Dwight*, N. Y. Law Journal, October 8, 1911, opinion quoted sub *Trust Deed*, page 872; affirmed, without opinion, 149 App. Div. 912; *Matter of Frazier*, N. Y. Law Journal, March 28, 1912, opinion quoted sub *Power of Appointment*, page 778; *Matter of Seaman*, id., December 5, 1913, opinion quoted, page 780.

1907.

MATTER OF FREDERICK COOK, 187 N. Y. 253, reverses 114 App. Div. 718, and affirms 50 Misc. 487, as modified.

Testator died a resident February 17, 1905. The widow and daughter in good faith filed objections to the probate of the will, the principal ground of which was that the testator did not possess testamentary capacity. The parties agreed to a compromise by which the residuary of the estate over the sum of \$97,000 should pass to Mrs. Cook upon the final distribution of the estate. In other words, the residuary legatees, for the purpose of securing the probate of the will, by which they would

receive the payment to them of general legacies bequeathed to them, amounting to \$180,000, voluntarily renounced all of the residuary of the estate except the sum of \$97,000.

The court say, page 256: "By the appeal of the comptroller the question is presented whether the transfer tax upon the residuary estate should be at the rate of one per cent, as fixed by the Appellate Division, or five per cent, as fixed by the surrogate. The tax was reduced upon the theory that the compromise was a renunciation by the residuary legatees of their interest in the residuary estate, and this conclusion was reached in reliance upon the recent case of *Matter of Wolfe* (89 App. Div. 348; 179 N. Y. 599). * * *

"(Page 258.) The facts in the present case are utterly different in their nature and in the legal effect thereof. Here the transfer of the residuary estate was to the residuary legatees named in the will. They neither renounced nor refused to accept. On the contrary, they accepted the bequest, not in express terms, but by necessary implication, for they transferred the same to the widow who accordingly took the residuary estate not through transfer by the will, but through transfer by the assignment. While they could renounce they could not assign without accepting. The testator gave the residuum to his nephews and nieces and they sold it to the widow, who paid a large sum of money therefor. * * *

"(Page 259.) The compromise did not change the will. No settlement could change a word that the testator wrote. The will stands as it was written, and the most solemn instrument, executed by all parties interested, could not convert a bequest to the nephews and nieces into a bequest to the widow. * * * A succession tax is measured by the legal relation which the legatee bears to the testator and is not affected by the relation which an assignee of the legatee bears to him. Here the legatees took the residuum under the will. They succeeded the testator in the ownership thereof and their succession gives rise to the tax. The widow did not take the residue from the testator, for he did not give it to her. She took as assignee, not as legatee. Unless she took as assignee, she did not take at all. The legatees assigned to her and the rate of taxation is fixed by their relation to the testator. As she did not take through the will, the succession tax cannot be fixed at the rate of one per cent, as in the case of a bequest to a widow, but must be fixed at the rate of five per cent, as in the case of a bequest to nephews and nieces."

The testator left a legacy to the son of his adopted daughter, and it was held that he was a lineal descendant in the eye of the law, the court saying, page 262, that the transfer to him "was subject to taxation at the same rate as if his mother had sprung from the loins of the testator." ¹

Surrogate Brown of Monroe County passed upon the question of the value of certain stocks.² His order in this respect was affirmed, 187 N. Y. 253-262. In his opinion he said, 50 Misc. 487-493: "The appellants also appeal from that portion of the order fixing the tax on said estate, on the ground that certain stocks should be reduced by ten per cent. from the value fixed by the appraiser, for the reason that the stocks included in said appeal are local stocks and not listed on any stock market other than the Rochester Stock Exchange, and that the valuation placed upon said stocks and based upon the quotations of said market at or about the time of the death of Frederick Cook should be reduced ten per cent to reach their fair market value; and we are referred to the Curtice case, decided by the Appellate Division, Fourth Department (111 App. Div. 230), and just recently affirmed by the Court of Appeals, as an authority for such reduction.

"The stocks referred to are the American Fruit, preferred, Case Manufacturing Company, Ohmer Car Register, preferred, Rochester Telephone, New York & Kentucky, common, New York & Kentucky, preferred, Pneumatic Signal, Stromberg-Carlson, common, Stromberg-Carlson, preferred, General Railway Signal Company, preferred, General Railway Signal Company, common. The appraiser fixed these stocks substantially as fixed by the witness who was called by the executors, and who had been one of the appraisers who inventoried the property of the estate of Frederick Cook upon the statutory inventory taken by the executors with the aid of the appraisers appointed by the surrogate for that purpose; and it appears that he fixed those values at the market value of the respective stocks on the Rochester Stock Exchange, on or about the date of the death of Frederick Cook, deceased, except in one or two instances where, there being no quotation on the Rochester market, he gave his own opinion or sought information from interested parties who were conversant with the affairs of such corporation, and from such information fixed the value as to such stock. He also testified that, if these stocks were offered for immediate sale, the price would drop from ten to fifty points, but he further

testified 'It would take at least a month or six weeks to close out these stocks at the prices I have quoted in the inventory.' There was no necessity for the disposal of those stocks by the executors in a month or six weeks. In fact, the executors could not dispose of them until after the probate of the will, and even then they would not be required, and in fact it would be contrary to good business judgment, to throw a large amount of stock on the market at once, unless there was special reason for so doing.

"In the Curtice case over a third of the capital stock of the corporation in question was owned by the testator, and in the neighborhood of another third by his brother, and accordingly it was spoken of as a 'private corporation' by Justice Hiscock in his opinion, delivered with the decision of the Appellate Division, and for the reasons above stated the stock in the Curtice Company was not necessarily worth the quotations of the stock market, and from those facts the Appellate Division reduced the valuation of the stock as appraised on the Rochester stock market valuation.

"It does not seem to me that the Curtice case applies to the Cook case. All of the above stocks owned by the Cook estate, although local stocks, are not stocks that could be classed as stocks of private corporations or as corporations largely owned by one family. There is no evidence that Mr. Cook's holding was a large percentage of the total capitalization of said companies. Several of the stocks are stocks of large corporations engaged in important enterprises and apparently doing a prosperous business, and the rest of the companies that do not come under that head are small companies, as to which there is no evidence that Mr. Cook's interest therein was so large as to affect the market values of the stocks.

● "I accordingly hold that the stocks in question do not come under the conditions which obtained in the Curtice case, and that the value of said stocks as fixed by the appraiser, and subsequently fixed by the order entered herein, is correct, and that portion of the order fixing the tax thereon should be affirmed."

Vide § 221a. Matter of Cook, 194 N. Y. 400; Matter of Duryea, 128 App. Div. 205-206; Matter of Merritt, 155 App. Div. 228-232; Matter of Yerkes, N. Y. Law Journal, December 5, 1912, and Matter of Lawrence, id., February 15, 1913, quoted sub Compromise of Claim; Matter of Thomas, 39 Misc. 223; Matter of Marks, 40 Misc. 507.

¹ Matter of Roebuck, 79 Misc. 589.

² Vide cases cited sub Closely Held Stock.

1907.

MATTER OF GEORGE HESS, 187 N. Y. 554, affirms, on opinion of Spring, J., below, 110 App. Div. 476.

Testator died a resident August, 1904. He was eighty years old when he died, and on February 20, 1904, he entered into a written agreement with Silas L. Strivings (page 477) "whereby Strivings agreed to remove with his wife to the farm of Hess in the town of Castile, occupying the dwelling in common with Hess and his wife, supporting and caring for them during their natural lives. Strivings agreed to 'reside upon and work' said farm as long as said Hess 'and his said wife, or either of them shall live.' By the terms of the contract the party of the second part was to harvest and thresh the wheat growing upon the farm, using whatever remained beyond the needs of the farm and the family use for his own benefit. The party of the first part was to market the 'salable wood now cut on said premises' for the benefit of said second party and was also to sell 'any surplus of grain not needed for use.'

"In consideration of the agreement it was provided that Hess 'does hereby grant and convey, subject to said agreements, to said Silas L. Strivings and Mae L. Strivings, his wife,' the farm mentioned, describing it by metes and bounds, together with the stock and personal property thereon. The 'right to support, maintenance and residence on said' farm was reserved during the life of said Hess and his wife, and Strivings and his wife agreed not to sell said premises during the lifetime of the grantor or his wife.

"On the same day that this contract was executed Mr. Hess executed his last will and testament, bequeathing the bulk of his property, amounting to about \$70,000, to Mrs. Strivings, appointing Silas L. Strivings executor thereof and also in said instrument ratifying and confirming the agreement now under consideration."

The court say, page 477: "We think that by this agreement and conveyance it was intended to vest the absolute title and immediate possession of said premises in the Strivings, subject to the maintenance of the grantor and his wife. * * *

"(Page 478.) There is no suggestion that the conveyance was in contemplation of death."

The court cite Matter of Brandreth, 169 N. Y. 437, and Matter of Cornell, 170 N. Y. 423, and say, page 481: "The dividing

line between those cases and the present one is well defined. In the present case the title in possession and the use of the avails and the increment passed to the grantees. In the other class of cases the beneficial enjoyment did not commence until the death of the donor and there is also the further fact that the conveyance to the Strivings was for an adequate consideration. In each of the cases mentioned the transfer was unquestionably a gift, and it is to that class of transfers to which this tax relates."

Vide subdivision 4 of § 220. *Matter of Jones*, 65 Misc. 121; *Matter of Dobson*, 73 Misc. 170; *Matter of Loewi*, 75 Misc. 57; *Matter of McKeon*, N. Y. Law Journal, June 8, 1912, opinion quoted sub *Contemplation of Death*, page 647; *Matter of Vietor*, id., May 8, 1913, opinion quoted sub *Good Will*, page 714; *Matter of Dee*, id., December 6, 1913, opinion quoted page 645.

1907.

MATTER OF GEORGE W. KIDD, 188 N. Y. 274.

Testator died December 3, 1901, and his will was admitted to probate April 5, 1903. By his will he created a number of trusts, the ultimate remainders in which were contingent. The details of the will are immaterial. After transfer tax proceedings were instituted an agreement was entered into in March, 1905, between the executor and the state comptroller, under the provisions of § 230a (now 233) of the Tax Law, compromising the tax at the sum of \$10,000, which was paid to the comptroller.

In July, 1903, the respondent, Grace G. Dickinson, commenced an action in the Supreme Court against the executor, the heirs and next of kin, the legatees and devisees of the decedent, for the specific performance of an ante-nuptial contract made by the decedent, her stepfather, with her mother, in and by which he agreed, in consideration for her mother's marrying him on the 19th day of November, 1875, and advancing to him for use in his business the sum of \$40,000, among other things, that he would adopt said Grace G. Dickinson and give her his name and make her his heir, and in the event that he died without issue of said marriage, which event in fact transpired, he would will, bequeath and devise to her all of his property. The issues in said action were duly tried and on the 16th day of May, 1905, a decree was duly entered therein establishing the validity of said ante-nuptial contract and decreeing that the defendants

specifically perform the same by assigning, transferring and delivering to her any and all property of the estate remaining in their hands and to account to her for any thereof received by them which for any reason they are unable to turn over to her.

The court say, page 278: "While the principal argument before us has been devoted to the question whether the compromise made between the executor and the comptroller can now be set aside or attacked collaterally, we do not find it necessary to consider the question since we are of opinion that, giving full effect to the judgment in the Supreme Court action, nevertheless the estate is liable to the transfer tax. The contract between the plaintiff's mother and the deceased, which has been enforced by the judgment of the Supreme Court, was to bequeath and devise to his step-daughter by will, either the whole property he might leave or a portion of it dependent upon the existence of other children. It was not a contract to convey, but a contract to make a will in her favor. Had the deceased performed his agreement and given her his property by will the estate would have been subject to the tax. * * *

" (Page 279.) The present case plainly differs in principle from those cited by the learned counsel for the respondent, such as *Matter of Pell* (171 N. Y. 48); *Matter of Baker* (178 N. Y. 575, affg. 83 App. Div. 530, on opinion below); *Matter of Craig* (181 N. Y. 551, affg. 97 App. Div. 289, on opinion below), and *Matter of Lansing* (182 N. Y. 238). In the *Pell* case the remainderman claimed under the will which had taken effect by the death of the testator in 1863. The estate vested in title though not in possession at that time. It was at all times alienable by the remainderman and also devisable and descendable, unless the limitations of the remainder were such as to make it fail on his death. This is true of the other cases cited. *Mrs. Dickinson* had no such interest in the estate of the deceased. While the testator could not have conveyed it in fraud of her rights, he could have entirely consumed it in living expenses or by speculation."

Vide § 233. As to right of comptroller to compromise vide dicta of the Appellate Division in this case, 115 App. Div. 205-208.

Matter of Demers, 41 Misc. 470, discussed sub *Ante-nuptial Contract*, page 589.

1907.

MATTER OF DAVID WOLFE BISHOP, 188 N. Y. 635, dismisses without opinion, appeal from 111 App. Div. 545.

Appeal dismissed because not from a final order. Code of Civil Procedure, subdivision 1 of § 190.

Testator died May 1, 1900. The executors contended that testator was a non-resident, and refused to supply appraiser with an account of testator's property not situated within the State. Appraiser thereupon reported to surrogate that the testator was a resident of the State of New York; that he had appraised the estate of the testator, so far as disclosed to him, subject to taxation, and specified the property and its value. He further reported that the testator died seized of other estate, both real and personal, but that the executors had declined to furnish the appraiser with a statement of the same or to give testimony as to the character thereof, and that for that reason he was unable to make any report in respect thereto.

The court say, page 546: "Upon this report coming on before the Surrogate's Court for hearing, the surrogate denied the motion to confirm the finding of the appraiser that the testator was at the time of his death a resident of the State of New York, and ordered that the question of such residence be referred to a referee, who was directed to take the testimony in respect thereto, and to report the same, with his opinion thereon, to the court, and that the motion to remit the matter to the appraiser to enable him to appraise all the assets of the decedent await the determination of the surrogate upon the coming in of the report of the referee. The surrogate then fixed the value of the property within the State of New York and the tax payable thereon, and from this order the Comptroller appeals. He insists that the surrogate was bound to determine the question of the residence of the testator upon the testimony before the appraiser, and that he had no power to refer that question to a referee."

The court quotes (page 547) § 2546 of the Code of Civil Procedure, and holds that surrogate had authority, under that section, to appoint a referee to take evidence as to residence of testator.

Vide *Matter of Bishop*, 82 App. Div. 112. As to question of residence vide *Tilt v. Kelsey*, 207 U. S. 43, reversing *Matter of Tilt*, 182 N. Y. 557; *Matter of Cummings*, 142 App. Div. 377; *Matter of White*, 116 App. Div.

183. As to recital in will vide *Matter of Schumacher*, N. Y. Law Journal, July 22, 1913, opinion quoted page 834.

Vide etiam *Matter of Grant*, N. Y. Law Journal, November 14, 1913, opinion quoted, *post*, page 833; etiam same estate, *id.*, December 9, 1913.

1907.

MATTER OF MARY COSTELLO, 189 N. Y. 288.

Intestate died a resident in September, 1895. Letters of administration were issued to the public administrator of Kings county in March, 1896. On a judicial settlement of his accounts in December, 1896, the decree showed that the total estate coming to his hands after the deduction of debts and expenses of administration was a balance of \$654.90 to be distributed to the next of kin of decedent. The sister was entitled to one-half of this balance, or \$327.45, and the nieces each to one-fourth thereof, or \$163.72. *Held*, that the shares of the nieces were taxable.

The court say, page 290: "A preliminary question of practice is raised for our consideration which arises under the following circumstances: The Transfer Tax Act (sections 231 and 232) provides for the action of the surrogate in a dual capacity. By § 231 the surrogate is permitted to act as a taxing officer or appraiser and may determine the cash value of an estate and the amount of tax to which the same is liable. Section 232 provides that the comptroller of the State or any person dissatisfied with the appraisement or assessment and determination of tax may appeal therefrom within sixty days to the surrogate to review the same.

"In the case at bar the learned counsel for the comptroller insisted that this practice was anomalous and unnecessary; that an appeal could be taken from the surrogate, acting as appraiser or assessor, directly to the Appellate Division, and he accordingly in order to test this question, served two notices of appeal from the order of the surrogate, acting as appraiser, wherein he determined that the estate was not subject to the transfer tax, one directly to the Appellate Division and the other to the surrogate, acting judicially, as the statute provides. The Appellate Division dismissed the comptroller's appeal taken directly to that court from the order of the surrogate acting as an assessor. On the comptroller's appeal taken from the order of the surrogate, acting judicially, the same was reversed.

"When we keep in mind the fact that the surrogate is a mere taxing officer or assessor, when acting under § 231, no incongruity is presented although it is somewhat unusual that a judicial officer should sit in review of his own decision as an assessor. It is, however, to be said that on an appeal to the surrogate, acting judicially, a complete record is submitted and both sides are heard. We are of opinion that the Appellate Division properly dismissed the comptroller's appeal from the order of the surrogate made when acting as a taxing officer."

As to Laws of 1910, chapter 706, in effect July 11, 1910, vide *Matter of Jourdan*, 206 N. Y. 653; *Matter of Mason*, 69 Misc. 280, discussed in 1 State Department Reports, 559. As to present statute vide *supra*, page 43.

1907.

MATTER OF LYDIA M. FRANCIS, 189 N. Y. 554, affirms, without opinion, 121 App. Div. 129.

Held, that under § 221 as amended by chapter 368, Laws of 1905, a bequest of money to Didymus Thomas Memorial Library Association, a New York library corporation, was taxable.

Vide second sentence of § 221. *Matter of Mergentime*, 129 App. Div. 367-374, affirmed, on opinion below, 195 N. Y. 572; *Matter of Saunders*, 77 Misc. 54-62, affirmed, without opinion, 156 App. Div. 891; *Matter of de Peyster*, N. Y. Law Journal, January 21, 1913, opinion quoted sub *Educational Corporations*, page 676, affirmed, without opinion, 156 App. Div. 938; *Matter of Higgins*, 55 Misc. 175.

1907.

IN THE MATTER OF FIXING THE TRANSFER TAX UPON THE REMAINDER LIMITED UPON THE LIFE OF SARAH M. MASON, UNDER THE WILL OF JOSEPH NAYLOR, DECEASED, 189 N. Y. 556, affirms, without opinion, 120 App. Div. 738.

Joseph Naylor died June 7, 1897. He devised certain real estate in trust for his wife during life, and directed the trustees upon her death, to hold such real estate upon seven separate trusts for the benefit of his seven nephews and nieces respectively, paying to each the net income of one equal seventh part during his or her life, with remainder in each case to his or her surviving lineal descendants. In 1898 an appraiser was ap-

pointed and he filed a report in which, inter alia, he fixed the value of the life estate of Sarah Morgan Mason, one of the nieces, and imposed a tax thereon. The value of the remainder limited upon her life was fixed at \$22,316, but no tax was imposed thereon because, according to his report, it could not then be definitely ascertained to whom such remainder would ultimately descend.¹

The court say, page 739: "Sarah Morgan Mason died November 27, 1905 leaving the appellants Walter R. Mason and Edgar F. Mason, her sons, and only surviving descendants. They each under the will of Joseph Naylor, became entitled to one-half of the one-seventh given to their mother for life. Shortly after the mother's death they applied to the surrogate for an order fixing the amount of the transfer tax upon the remainder limited upon the life of their mother, and which had previously been valued by the appraiser at \$22,316.

"The statute which was in force at the time of Naylor's death, under and by which the transfer tax had to be determined, was chapter 284 of the laws of 1897, and the surrogate held that the appellants were liable to pay under this statute, a tax, not on the value of the remainder as determined by the appraiser theretofore appointed, but upon the value of the real estate passing, undiminished by the value of the estate of their mother.

"This statute provides that 'Estates in expectancy which are contingent or defeasible shall be appraised at their full, undiminished value when the persons entitled thereto shall come into the beneficial enjoyment or possession thereof, without diminution for or on account of any valuation theretofore made of the particular estates for purposes of taxation, upon which said estates in expectancy may have been limited.' [Tax Law (Laws of 1896, chap. 908), § 230, as amd. by Laws of 1897, chap. 284].² * * *

"(Page 740.) What is claimed is that that appraisement having been made, and the State being represented, an error of law was committed which could only be corrected by appeal; that no appeal was taken by the State, and, therefore, it is not in a position to assert that that order was erroneous; in other words, that that order is *res adjudicata* as to the value of the estate passing to the appellants. The value of the estate passing to the remaindermen was not before the appraiser. There was no necessity for, and he had no authority to pass upon that question.³ * * * (Page 741.) The fact that the appraiser under-

took to determine the value of the estate which would ultimately pass to the remaindermen did not bind them, because they were not represented, and if it did not bind them, I do not see how it can be claimed that it bound the State."

¹Vide sixth paragraph of § 230; *Matter of Vanderbilt*, 172 N. Y. 69.

²*Matter of Kennedy*, 93 App. Div. 27; *Matter of Meyer*, 83 App. Div. 381; *Matter of Connolly*, 38 Misc. 533; *Matter of Hosack*, 39 Misc. 130; paragraph seventh of the present § 230; etiam *Matter of Eno*, N. Y. Law Journal, April 24, 1913, opinion quoted, page 820.

³*Matter of Irwin*, 36 Misc. 277; *Matter of Ely*, 157 App. Div. 658; *Matter of Stuart*, N. Y. Law Journal, May 10, 1913, opinion quoted sub *Power of Appointment*, page 772.

1907.

MATTER OF MEYER GUGGENHEIM, 189 N. Y. 561, affirms, without opinion, 116 App. Div. 914, which affirms, without opinion, order of Surrogates' Court, opinion in New York Law Journal of January 6, 1906.

Testator died a resident March 16, 1905. He created by his will a trust fund for his granddaughter, Nettie Gerstle, who at the time of his death was fifteen years of age and unmarried. She was to receive the income during life, and, on her marriage, a portion of the principal. The will then provided: "Upon the death of my said grandchild, the whole of the principal fund so held in trust, * * * shall be divided equally among her children her surviving, the issue, however, of any deceased child to take per stirpes, the share which the parent would have taken if living; if she shall leave no issue her surviving, then the said principal fund so held in trust shall be divided into two equal shares." One of the shares to go to certain charitable and hospital corporations.

Surrogate Thomas said: "The remainder interest of each of the corporations is fixed at \$11,007.37, and the order assesses a tax thereon of five per cent. At the time of decedent's death bequests to charitable and hospital corporations were subject to said tax (Tax Law, § 221, as amended in 1903). By chapter 368, Laws of 1905 (in effect June 1, 1905, and at the time of the appraisal), such corporations are specifically exempted from the tax.¹ The corporations contend that as to these remainder interests there has been no transfer, and that there will not be any to them unless Nettie Gerstle should die without

issue her surviving. The decisions in *Matter of Vanderbilt*, 172 N. Y. 69, and *Matter of Brez* (id. 609) are fatal to this contention.² There was a consummated transfer to the trustee at the moment of the testator's death, and upon this transfer the tax is imposed. * * * Besides the remainder interests above referred to the will gives to each of the appealing corporations an immediate cash legacy of \$20,000, which is not involved in this appeal.³ In the order, each corporation is directly assessed on the combined values of its immediate cash legacy and its remainder interest. The order will be modified so as to assess the tax upon the cash legacies to said corporations against them, respectively, and the tax upon all of the interest included in the fund transferred for the purpose of the trust against the trustees as such."

¹ Section 221.

² Sixth paragraph of § 230; vide footnote, *supra*, page 273, to *Matter of Brez*, 172 N. Y. 609.

³ *Matter of Title Guarantee & Trust Co.*, 81 Misc. 106.

1908.

MATTER OF CHARLES RAMSDILL, 190 N. Y. 492.

Intestate died a resident of Massachusetts on December 19, 1903. The transfer tax appraiser made a report to the surrogate showing that the decedent's total personal estate amounted to \$72,642, of which only \$6,460 was within this State, and that the total charges against the estate for funeral expenses, debts and costs of administration, were \$12,041.66. According to this appraisal the assets within this State amounted to nine per cent of the decedent's total personal estate, and the appraiser, therefore, deducted therefrom nine per cent of the debts and expenses referred to, which amounted to \$1,084.¹ Computed upon this basis, the decedent's net assets within this State were valued at \$5,376, upon which the share of the intestate's brother was reported as exempt from tax, and the shares of the nephews and nieces were reported as taxable at the rate of five per cent.

The court cite *Matter of James*, 144 N. Y. 6, and say, page 496: "When a specific foreign legatee of a foreign testator can obtain satisfaction of his legacy in a foreign jurisdiction, the executor cannot be compelled to pay such a legacy out of the assets within our jurisdiction. This is the necessary result of

the practical and obvious distinction between testacy and intestacy as applied to this subject of taxation. If a specific legatee needs not the intervention of our laws or courts to obtain what comes to him under a foreign will through foreign assets, in a foreign jurisdiction, our laws cannot coerce an executor into paying his legacy out of funds within our jurisdiction for the sole purpose of exacting a tax.

"But in a case of intestacy the rule is essentially different, because the distributee takes an undivided interest in the whole estate; and if part of it happens to be within our jurisdiction, he can only get his share of what is here under our laws and through our courts. This is the theory upon which the nephews and nieces of the intestate in the case at bar are clearly taxable under our statute."

After this decision subdivision 2a (now subdivision 3) of § 220 was added by chapter 310, Laws of 1908, in effect May 18, 1908. 1 State Department Reports, 605-607, opinion quoted, *supra*, page 152.

¹ Matter of Porter, 67 Misc. 19, affirmed, without opinion, 148 App. Div. 896. Only "Tangible" property within State subject to tax in non-resident estate if transfer made since amendment by Laws of 1911, chapter 732, in effect July 21, 1911, subdivision 2 of § 220 and § 243.

1907.

MATTER OF SARAH J. G. SPENCER, 190 N. Y. 517, dismisses, without opinion, appeal from 119 App. Div. 883, which affirms, on opinion of Surrogate, the order of Surrogate. Same case, 193 N. Y. 613, affirms, without opinion, 126 App. Div. 954, which affirms, without opinion, the order of Surrogate.

Testatrix died a resident March 2, 1905. Her father, Charles C. Griswold, died a resident of Connecticut on January 27, 1869. By his will he created a trust fund which gave to his daughter, Sarah G. Spencer, a life estate with remainder over to her heirs, she, however, having power of appointment over said remainder. She exercised this power of appointment in favor of her heirs. Two of the appointees did not appear before the appraiser and the other two made no formal election to take under the will of Charles C. Griswold.

Surrogate Thomas said, page 884 of 119 App. Div.: "The vital distinction made by the Court of Appeals in Matter of Cooksey

(182 N. Y. 92) and *Matter of Lansing* (id. 238), argued on the same day before that court, is based upon the difference existing in the two wills of the several donors of the powers. In the will in *Matter of Cooksey*, the remainder of the trust estate created for the benefit of the donee of the power was directed to pass to or vest in the children of the donee of the power upon her death as she by her 'last will and testament shall designate and appoint and in such manner and upon such terms as he or she may legally impose.' The only alternative provision was that 'in case such person dies intestate' the said trust fund should 'vest absolutely and at once' in the surviving children, share and share alike, of the donee of the power. Under this will it was necessary, in order that the children of the donee of the power should take, either that there should be an exercise of the power, or that the donee of the power should die intestate. Her children had no title except under the execution of the power and the transfers to them were, therefore, held taxable.

"In the *Lansing* case there was a direct devise and bequest contained in the will of the donor of the power, by which the corpus of the trust fund was given 'to her heirs at law, subject, however, to the power of such child to devise hereinafter contained.' Under this will Vann, J., remarked: 'The execution of the power left the title where it was before, and the result is the same as if there had been no power to exercise.' In other words, the final beneficiaries of the corpus of the trust property having been selected by the donor of the power, and an explicit bequest and devise of that property having been made by the donor of the power to such final beneficiary, subject only to a power in the donee to modify or change such bequest and devise, the title of the remainder passed to the beneficiaries under the will of the donor of the power, notwithstanding an attempt to exercise the power by the donee in such a way that no change whatever was effected in such original bequest and devise.

"The distinction between these two cases was pointed out by Vann, J., in 182 N. Y. 246. In the case before me the will of the donor of the power is substantially the same as the will in *Matter of Lansing* and the will of the donee of the power neither adds to nor takes away from any of the final beneficiaries the benefits which the will of the donee of the power expressly conferred upon them."

Vide subdivision 6 of § 220. *Matter of Smith*, 150 App. Div. 805-808; *Matter of Ripley*, 192 N. Y. 536; *People ex rel. Ripley v. Williams*, 69 Misc.

402; *Matter of Chapman*, 199 N. Y. 562; *Matter of Haight*, 152 App. Div. 228; *Matter of Lewis*, 60 Misc. 643, reversed in 194 N. Y. 550.

Matter of Mitchill, N. Y. Law Journal, November 22, 1913, opinion quoted, *post*, page 777.

1907.

MATTER OF LYMAN F. RHOADS, 190 N. Y. 525, affirms, without opinion, 120 App. Div. 882, which affirms, without opinion, order of Surrogate's Court.

Testator died a resident of Massachusetts on May 30, 1905. Decedent was the owner of a life insurance policy on his life in Mutual Life Insurance Company of New York. The beneficiaries named in said policy were the decedent's wife, or in the event of her dying before him then his children were mentioned as such beneficiaries. As a matter of fact, decedent's wife and all his issue predeceased him, and at the time of his death his sister was his only heir and next of kin. The policy was in decedent's safe deposit box in Boston. *Held*, not taxable.¹

Decedent was the owner of stock of United States Leather Company, a New Jersey corporation, which had been deposited, under a reorganization agreement, with Central Trust Company of New York. Surrogate Thomas said: "The testator did not part with the title to his stock in the New Jersey corporation when he deposited it with the Central Trust Company of New York and accepted the receipts or certificates of that company therefor; and the Trust Company did not then or at any time acquire any beneficial ownership therein. At the time of the death of the testator he continued to own that stock, subject to the rights acquired by the other owners of stock in the New Jersey corporation who became parties to the pending scheme for its reorganization, and the trust company was, in substance, mere stakeholder and the agent and bailee of the real parties in interest. The transfer of the stock of the foreign corporation on the death of the non-resident testator was not taxable." *Held*, not taxable.

Vide subdivision 2 of § 220 and § 243.

¹ Vide *Matter of Gordon*, 186 N. Y. 471; *Matter of Abbett*, 29 Misc. 567; *Matter of Horn*, 39 Misc. 133; *Matter of Gibbs*, 60 Misc. 645. As to resident estates, *Matter of Knoedler*, 140 N. Y. 377; *Matter of Parsons*, 117 App. Div. 321; *Matter of Fay*, 25 Misc. 468; *Matter of Elting*, 78 id. 692.

1907.

MATTER OF ROBERT R. WILLETS, 190 N. Y. 527, affirms, without opinion, 119 App. Div. 119.

Testator died August 22, 1903. The transfer tax appraiser's report was confirmed on April 30, 1904. This was a motion to modify the order and to direct the State Comptroller to refund a portion of the transfer tax heretofore paid.¹

It was assumed, when the original taxing order was made, that a one-fifth interest in the house and lot belonged to the decedent at the time of his death. A subsequent decision of the Supreme Court determined that he had no interest in said house and lot. The court say, page 125: "Ordinarily, where a determination is set aside on the ground of newly discovered evidence, the order setting it aside should not contain an adjudication contrary to the former determination but should provide for a new hearing upon which both parties may be heard. But this rule does not make it improper for a surrogate, when incontrovertible evidence is presented to him, as it is in this case, establishing that a transfer is not subject to the transfer tax which has been assessed and fixed upon it, to modify the order in respect to the erroneous tax, without remitting the matter to the official appraiser for retaxation. In the present case the facts relied upon by the petitioner to establish the exemption of the property in question from a transfer tax are not disputed; and, under such circumstances, it would be an idle ceremony for this court to send the matter back to the official appraiser for a reappraisal of the estate. (Matter of Cameron, 97 App. Div. 436.) As already stated, the error complained of was disclosed by the decision of the Supreme Court in the action for the construction of the will of the elder Willets.

"The State Comptroller contends that he is not bound by the decision, as he was not a party to the action. That is true. It was not necessary to make him a party to that action, and I do not hold that the decision is *res adjudicata* as to him.² As it is, however, an unreversed decision of the Supreme Court upon the direct question presented to me, as to the vesting of the undivided one-fifth interest in the property mentioned, I feel that I must be controlled by it and leave it to the respondent here to correct any error by a review of the decision of this court."

¹ Vide §§ 225 and 228 and subdivision 6 of § 2481 of Code of Civil Proce-

dure; *Matter of Townsend*, 153 App. Div. 85-88, appeal pending; *Matter of Weiler*, 122 N. Y. Supp. 608, affirmed, without opinion, 139 App. Div. 905; *Matter of Scott*, 208 N. Y. 602 and cases cited sub Vacating Decree.

² *Matter of Edson*, 38 App. Div. 19-21, affirmed, on opinion below, 159 N. Y. 568; *Matter of Lawrence*, N. Y. Law Journal, February 15, 1913, opinion quoted *supra*, page 318.

1908.

IN THE MATTER OF THE APPLICATION OF WILLIAM C. DUELL, FOR A WRIT OF MANDAMUS AGAINST MARTIN H. GLYNN, AS COMPTROLLER, 191 N. Y. 357, affirms 122 App. Div. 314, which affirms 56 Misc. 41.

Under § 234 a transfer tax assistant cannot be appointed except on the joint action of the State Comptroller and the Surrogate. The Comptroller may, however, "at pleasure remove him."

As to transfer tax appraisers vide *Matter of Weeks v. Kraft*, 147 App. Div. 403; *People ex rel. McKnight v. Glynn*, 56 Misc. 35.

1907.

MATTER OF SIDNEY D. RIPLEY, 192 N. Y. 536, affirms, per curiam, 122 App. Div. 419.

Testator died in 1905. His grandfather, Sidney Dillon, died in 1892, leaving a will by which he created a trust for the benefit of his grandson, Sidney Dillon Ripley, and his daughters. The income from the trust property was directed to be paid to his daughters and grandsons during their respective lives; "on the death of either leaving lawful issue surviving, the share of the one so dying shall, unless otherwise disposed of as directed by the last will of the one so dying, be held for the use and benefit of such lawful issue, equally, share and share alike."

The Appellate Division say, page 421: "It was the manifest purpose and intent of the testator to give his grandson the right to dispose of his share of the trust estate by will to others than his own children, but in case he did not so dispose of it, his share became the property of his children, share and share alike. What then were the provisions of the will of Sidney Dillon Ripley? He in form assumed to dispose of all of his share of the trust property, but in fact he only 'otherwise' disposed of one-fifth part of it. This he gave to his widow, while the remaining

four-fifths went to the same identical beneficiaries and legatees named in Sidney Dillon's will and in the same relative share. * * *

"(Page 422.) We see no reason why the fact that Mr. Ripley gave one-fifth to his widow should in any way change or prevent the application of the bequest contained in Sidney Dillon's will as to the remaining four-fifths, and we conclude the children took by virtue of that will.¹

"It is questionable at least whether Sidney Dillon's will when properly construed gave to his grandson Sidney Dillon Ripley any power of appointment unless he exercised it to make a disposition different from that contained in the Dillon will. Granting however, for the argument that the right of appointment by which Mr. Ripley gave one-fifth to each of his children was a valid exercise of the right conferred, and that the children had the right to claim under and avail themselves of the property in question under such appointment, nevertheless, they also had the right to repudiate such provisions and claim directly under their great-grandfather's will. (Matter of Lansing, 182 N. Y. 238, 244.)"

The Court of Appeals say, per curiam: "The order appealed from should be affirmed, with costs, on the ground that the power of appointment created by the will of Sidney Dillon in favor of Sidney Dillon Ripley was limited, and could only be exercised in favor of persons who did not take under the will. That is the meaning of the words in said will 'unless otherwise disposed of as directed by the last will of the one so dying.' The great-grandchildren of Sidney Dillon took directly under his will, except as their interest may have been divested or cut down by a valid exercise of the power."

Vide subdivision 6 of § 220. Matter of Smith, 150 App. Div. 805-808; Matter of Warren, 62 Misc. 444-448; People *ex rel.* Ripley v. Williams, 69 Misc. 402.

¹ As to the exercise of power over a part, and not over the whole of the fund vide Matter of Stuart, N. Y. Law Journal, May 10, 1913, opinion quoted sub Power of Appointment, page 772.

As to right of election vide Matter of Mitchill, N. Y. Law Journal, November 22, 1913, opinion quoted, *post*, page 777.

1908.

MATTER OF JULIA B. THAYER, 193 N. Y. 430, affirms 126 App. Div. 951, which affirms, without opinion, 58 Misc. 117.

Testatrix died a resident of New Hampshire on May 25, 1905. She owned certain shares of stock in Boston and Albany Railroad Company, and also in the Fitchburg Railroad Company. The court say, page 431: "Both companies are incorporated under the laws of Massachusetts as well as under the laws of New York, and each company owns property in both States. In *Matter of Cooley* (186 N. Y. 220) this court decided that such stock should be assessed for the purposes of the transfer tax at a value representing the corporate property within this State, to be arrived at by ascertaining the proportionate value of the property of the corporation situated in New York with reference to that of the property situated in Massachusetts. It was suggested in the opinion that this value might be computed with substantial accuracy by 'an apportionment based upon trackage or figures drawn from the books or balance sheets of the company.' Accordingly in the present case the surrogate adopted the total track mileage of the Boston and Albany railroad and the Fitchburg railroad as the basis for his computation; and neither party, upon the argument of the appeal in this court, finds any fault with his action in this respect. It was made to appear, however, upon the hearing before the appraiser that the Fitchburg Railroad Company owns in Boston and in Somerville, Massachusetts, certain grain elevators and connecting tracks which are described as being 'outside of and apart from the ordinary freight and passenger terminals of the road.' This so-called special property was deducted by the surrogate from the total capital before apportioning the stock on a mileage basis, and the learned counsel for the comptroller insists that this was an error which demands a reversal of the order. * * *

"(Page 433.) In the case at bar the effect of the decision of the surrogate is to hold that a deduction of the special property of the Fitchburg Railroad Company, which has been mentioned, consisting of marine terminals in Boston and Somerville, not used in the ordinary business of the corporation, was necessary in order to determine the true value of the stock. The valuation of the stock is a question of fact. The decision of the surrogate

on this question of fact has been unanimously affirmed by the Appellate Division, and, as it involves no error of law, it is conclusive in this court."

Prior to amendment of §§ 220 and 243 by chapter 732, Laws of 1911, in effect July 21, 1911, in estates of non-residents, stock in Boston and Albany R. R. was taxed on .1837 basis, and in Fitchburg Railroad Co. on .2551 basis. As to joint-stock associations, *Matter of Wilmer*, 153 App. Div. 804.

As to stock in corporations incorporated only in New York, vide *Matter of Palmer*, 183 N. Y. 238.

As to present law in non-resident estates vide *supra*, page 133.

1908.

WILLIAM G. DUNHAM v. CITY TRUST COMPANY OF NEW YORK, 193 N. Y. 642, affirms, without opinion, 115 App. Div. 584.

The plaintiff was the executor of John Dunham who died a resident of Missouri in June, 1903. Decedent was the registered owner of stock of a New Jersey corporation. The City Trust Company of New York was the sole transfer agent of said New Jersey corporation. On July 13, 1903, the executor wrote to the City Trust Company of New York enclosing the certificates of stock standing in decedent's name and requesting the issuance of new certificates in place thereof to specified persons. The Trust Company immediately replied that it required a certified copy of the will and proof of the issue of letters testamentary before it would make the transfer. On the same day the Trust Company wrote to the Comptroller of the State of New York requesting that he issue the "usual consent to the transfer." The Comptroller immediately replied by letter that as it was "the estate of a non-resident decedent—no letters having been issued or applied for in this State," the Comptroller asked the City Trust Company of New York to defer the transfer "until it can ascertain as to the liability of said estate to taxation. If the estate proves to be exempt you will be immediately notified, and consent forwarded. Notification of this action has been sent the representatives of said estate." On the twentieth of the same month the executor sent to the Trust Company as requested by it a certified copy of the will and of the letters testamentary. Two days later the Trust Company wrote to the executor asking for a verification of his signature to the

assignment of the stock, and on July twenty-fifth the executor complied with this request, and asked for the transfer without delay. On the twenty-ninth of the same month the Trust Company informed the executor that the verification was satisfactory but that it would not make the transfer until the New York State Comptroller issued his consent. On October 1, 1903, the Trust Company again wrote to the New York State Comptroller asking him if he was prepared to give his consent. The State Comptroller replied the next day that the department had written to the executor in St. Louis asking for an affidavit setting forth the assets of the estate. The Comptroller wrote to the Trust Company that not having heard from the executor, the department requested "that the transfer of such stock be deferred by you." Thereafter counsel for the executor communicated with the Trust Company and as a result the transfer of the stock was finally made by the Trust Company on October 24, 1903. The Comptroller never issued his consent.

Meanwhile the market value of the stock had decreased, and the executor sold the stock at a loss. Thereupon the executor sued the Trust Company for the difference between the price realized and the value of the stock on July 29, 1903, some \$14,000. Judgment was given in favor of the executor for this amount, with interest, at the trial term of the court. This judgment was reversed, the court saying, page 587: "The action is not for a conversion, for the plaintiff received the stock and sued for the damages incident to the omission of the defendant to transfer it. The proposition of the plaintiff is that it became the duty of the defendant to make the transfer on or about July 29, 1903, but as it did not make the transfer until October 22 or 24, 1903, it must, therefore, respond for any damages incident to such delay. * * * The stock in a foreign corporation owned by a non-resident was not taxable. (Matter of Whiting, 150 N. Y. 27.) Therefore, the consent of the State Comptroller, provided for by § 228 (now § 227) of the Tax Law, was not necessary in order to protect the defendant. But I am of opinion that this action does not lie. In *Denny v. Manhattan Co.* (2 Den. 115) the resident transfer agent of a foreign corporation unjustly refused a transfer, and the plaintiffs brought action on the case. The court held that the action did not lie against the defendant, as it was not the agent of the plaintiffs and owed them no duty, but the agent of the defendant, to whom alone it was answerable for any neglect in the discharge of

agency. * * * The eminent and able counsel for the plaintiff does not quarrel with the rule in *Denny's case*, but would take this case out of it upon the ground that the defendant is chargeable with a misfeasance, in that 'it undertook to do the business in an improper manner.' Whether Mr. Wharton is correct when he speaks of the 'now exploded distinction between misfeasances and non-feasances' (*Wharton's Agency*, § 537) it is not necessary to discuss, for it seems clear that under the rule in this State the contention of the plaintiff cannot prevail. In *Van Antwerp v. Linton*, 89 Hun, 417, 419, the court, per Parker, J., say: 'As between himself and his master he is bound to serve him with fidelity, and for a breach of his duty he becomes liable to the master, who in turn may be charged in damages for injuries to third persons occasioned by the non-feasance of the servant. For misfeasance the agent is generally liable to third parties suffering thereby. The distinction between non-feasance and misfeasance has been expressed by the courts of this State as follows: "If the duty omitted by the agent or servant devolved upon him purely from his agency or employment, his omission is only of a duty he owes his principal or master, and the master alone is liable. While if the duty rests upon him in his individual character and was one that the law imposed upon him independently of his agency or employment, then he is liable." (*Burns v. Pethcal*, 75 Hun, 443).' The judgment was affirmed on the opinion below (157 N. Y. 716). In the case at bar the duty in which the defendant is said to be derelict was one devolved upon it solely perforce of the relation of principal and agent existing between it and the New Jersey corporation. In other words, the injury, if any, was not in failure of duty cast upon the defendant 'by law in common with all other men.' I recommend that the exceptions of the defendant be sustained and that a new trial be granted, costs to abide the event."

A new trial was not had because the plaintiff appealed to the Court of Appeals and upon the stipulation entered into by him under subdivision 1 of § 190 of the Code of Civil Procedure, the Court of Appeals upon affirming the Appellate Division ordered judgment absolute against the plaintiff.

Vide § 227 as to consent of State Comptroller re transfer of securities, deposits or other assets subject to the inheritance tax; State Comptroller's opinion, dated December 23, 1912, 1 State Department Reports, 579, etiam opinion, dated January 16, 1913, id. 601, etiam opinion, dated Febru-

ary 21, 1913, 2 State Department Reports, 496; *People v. Mercantile Safe Deposit Co.*, 158 App. Div. 000, opinion quoted, *post*, page 837.

1908.

MATTER OF JAMES B. M. GROSVENOR, 193 N. Y. 652, affirms, without opinion, on authority of *Matter of King* (71 App. Div. 581) 126 App. Div. 953, which affirms, on authority of 124 App. Div. 331, the order of the surrogate.

Testator died a resident of Rhode Island on September 25, 1905. The court in 124 App. Div. 331, say, page 332: "The question presented upon this appeal is whether the property of a non-resident, located within this State, is subject to a transfer tax when it appears that his indebtedness to creditors who are residents of this State is in excess of the value of the testator's property within this State. * * *

"Upon the death of a non-resident, to administer his property within this State it is necessary that ancillary letters should be issued and the executors or administrators thus named are vested with the title to the decedent's property within this State. (Code Civ. Proc., §§ 2695 *et seq.*) Such property is applicable to the payment of the decedent's debts and the surrogate is required to direct the person to whom ancillary letters have been issued to pay out of the money or the avails of the property received by him the debts of the decedent due to creditors residing within this State. (Code Civ. Proc., § 2701.) * * *

"The principle applicable to this taxation is different from that applicable to the taxation of personal property of residents of this State, for here the tax is not against the individual or against the particular property, but is a tax upon the transfer of that property, and it is only by reason of the transfer of the specific personal property in this State from the testator to his legatees that the State undertakes to tax, and when nothing actually passes by virtue of that transfer no tax is imposed. The Code having made this property within the State applicable to the payment of the debts of the decedent to resident creditors the fact that to release them the executor brought money of the decedent from out of the State and paid the debts so that the securities in this State could be transmitted to be administered at the residence of the decedent cannot make any difference as to what actually was transferred upon which a tax was imposed.

"If the securities had been sold and the proceeds used to pay

the debts to resident creditors there could be no question. The executors have procured the money, paid the debts, and released these securities from the liability for his indebtedness, in substance purchased the securities for the estate. This result is within Matter of King (71 App. Div. 581; *affd.* on opinion below, 172 N. Y. 616), and Matter of Westurn (152 Id. 93). There it was held that what was transferred and what was, therefore, taxable was the amount of the property of the testator less his debts."

Vide subdivision 2 of §§ 220 and 243. Matter of Porter, 67 Misc. 19-21, *affirmed*, without opinion, 148 App. Div. 896, opinion quoted, *supra*, page 147.

As to pledged securities vide Matter of Pullman, 46 App. Div. 574; Matter of Ames, 141 N. Y. Supp. 793-795; Matter of Bennett, 105 id. 1107; Matter of Havemeyer, 32 Misc. 416; Matter of Hurcomb, 36 id. 755; Matter of Cox, N. Y. Law Journal, January 10, 1912.

1909.

MATTER OF SUSAN A. KEENEY, 194 N. Y. 281, sustained in 222 U. S. 525, sub nom. Keeney v. New York.

Decedent died a resident March 29, 1907. In June, 1903, the deceased, by a deed of trust, transferred to the Fidelity Trust Company of Newark, New Jersey, certain personal property consisting of bonds and stock upon trust to pay to her during life one-quarter of the income, and the remaining three-quarters to her three children, and after her death to continue to pay the income or transfer the principal to her said children or their issue as in said deed provided. It was not contended before the surrogate that three-fourths of the trust estate, the income of which was payable to the intestate's children, were subject to a transfer tax (Matter of Masury, 28 App. Div. 580), but it was insisted that the remaining one-fourth, the income of which was reserved to the intestate during life, was subject to the tax, and the surrogate so held.

The United States Supreme Court say, page 533: "But the plaintiffs insist that there is a radical difference between an inheritance tax and one on transfers *inter vivos*. The first, they say, is an excise, imposed on a privilege; while that complained of here is really on property, though called a tax on a transfer. They argue that inheritance taxes have been sustained on the ground (United States v. Perkins, 163 U. S. 625), that no one

has the natural right to acquire property by will or descent, and if the State permits such acquisition, it may require the payment of a tax as a condition precedent to the right of using that privilege. On the other hand, they contend that the right to convey, or come into possession, does not depend upon a statutory or taxable privilege, but is a right incident to the ownership of property, and that the tax imposed by the statute on that right is in effect a tax on the property itself, and void because lacking in the elements of uniformity and equality required in the assessment of property taxes.

"But, if any such distinction could be made between taxing a right and taxing a privilege, it would not avail plaintiffs in the present case. There is no natural right to create artificial and technical estates with limitations over, nor has the remainderman any more right to succeed to the possession of property under such deeds than legatees and devisees under a will. The privilege of acquiring property by such an instrument is as much dependent upon the law as that of acquiring property by inheritance, and transfers by deed to take effect at death, have frequently been classed with death duties, legacy and inheritance taxes. Some statutes go further than that of New York and tax gratuitous acquisitions under marriage settlements, trust conveyances, or other instruments where the transfer of property takes effect upon the death, not merely of the grantor, but of any person whomsoever. * * * The validity of the tax must be determined by the laws of New York. The Fourteenth Amendment does not diminish the taxing power of the State, but only requires that in its exercise the citizen must be afforded an opportunity to be heard on all questions of liability and value, and shall not, by arbitrary and discriminatory provisions, be denied equal protection. It does not deprive the State of the power to select the subjects of taxation. But it does not follow that because it can tax any transfer (*Hatch v. Reardon*, 204 U. S. 152, 159), that it must tax all transfers, or that all must be treated alike.

"* * * (Page 537.) The real estate and tangible property in Texas were not within the taxing jurisdiction of the State of New York, and there was no effort to tax the transfer of that property. *St. Louis v. Ferry Co.*, 11 Wall. 423, 430; *Tax on Foreign Held Bonds*, 15 Wall. 301, 319. It is urged that on the same principle the stocks and bonds could not be taxed because they were in New Jersey in the hands of a trustee holding title

and possession, by virtue of a deed made three years before the grantor died.

"But the statute does not impose a tax on the property, but on the transfer. The validity of that burden must be determined by the situation as it existed in 1903, when the deed was made. At that time the grantor was a resident of the State of New York. This personal property there had its situs. She there made a transfer, which was taxable, regardless of the residence of the trustee or beneficiary. The fact that the assessment and payment were postponed until the death of the grantor would be a benefit to the remainderman in the many instances in which values deceased. But where the power to tax exists, it is for the State to fix the rate and to say when and how the amount shall be ascertained and paid. The fact that the liability was imposed when the transfer was made in 1903, and that payment was not required until the death of grantor in 1907, does not present any Federal question."

The Court of Appeals say, page 286: "A not wholly unnatural desire exists among owners of property to avoid the imposition of inheritance taxes upon the estates they may leave, so that such estates may pass to the objects of their bounty unimpaired. It is a matter of common knowledge that for this purpose trusts or other conveyances are made whereby the grantor reserves to himself the beneficial enjoyment of his estate during life. Were it not for the provision of the statute which is challenged, it is clear that in many cases the estate on the death of the grantor would pass free from tax to the same persons who would take it had the grantor made a will or died intestate. It is true that an ingenious mind may devise other means of avoiding an inheritance tax, but the one commonly used is a transfer with reservation of a life estate. We think this fact justified the legislature in singling out this class of transfers as subject to a special tax.

"It is also urged that the trust property was at the time of the intestate's death in another state with the legal title in the trustee. This does not affect the liability of the transfer to taxation. The liability in this case accrued at the time of transfer, no matter when imposed." ¹

Vide subdivision 4 of § 220. *Matter of Patterson*, 146 App. Div. 286-289, affirmed, without opinion, 204 N. Y. 677; *Matter of White*, 208 N. Y. 64-67; *Matter of Spring*, 75 Misc. 586.

¹ *Matter of Webber*, 151 App. Div. 539; *Matter of Dwight*, 149 App. Div. 912, opinion quoted sub *Trust Deed*, page 872.

1908.

MATTER OF FREDERICK COOK, 194 N. Y. 400.

Testator died a resident February 17, 1905, and the matter was before the court in 187 N. Y. 253. The notice of the present appeal from the order of the surrogate specifies a ground of appeal not set forth on the former appeal.

The court say, page 402: "The surrogate refused to dismiss this second appeal. He conceded the general rule to be that a person appealing from a judgment or order should include all his objections thereto in one appeal, but held that a surrogate's order fixing a transfer tax is a several judgment as to each interest taxed, and that a person aggrieved has the right to appeal separately from each adjudication therein contained. * * * The Appellate Division disagreed with the surrogate as to the motion to dismiss the appeal and reversed his order and granted the motion to dismiss. It allowed an appeal to this court, however, certifying four questions for our determination. * * *

"It is necessary to answer only the second question, 'Did the decision of the Court of Appeals herein finally determine all the rights of Frederick Cook MacDonell in this proceeding?'

"This court upon the first review of the decree fixing the transfer tax expressly affirmed the decree as modified. This appears from the remittitur upon that decision. Upon that appeal the appellant could have raised the question which he now seeks to have decided. He failed to do so. If the omission was excusable he should have applied to the surrogate, upon affidavits excusing the omission, to modify his original order by taxing the remainder interest in the \$200,000 trust fund at what he conceived to be the proper rate. The order fixing the transfer tax upon an estate is an entirety and a party claiming to be aggrieved thereby and taking an appeal should present upon that appeal every objection which he has to the order.

"It would lead to endless delay and confusion if he was permitted to take a separate appeal for each objection he had to the order of the surrogate. The practice in this class of cases has always been to consider only such objections as the appellant specifies and to affirm the order as a matter of course in all other respects. The specification of one or more objections is deemed equivalent to a concession that the appellant regards the decree in all other respects correct. It is in substance an appeal only from those parts to which objection is made, and after an appeal

from one part of a decree a defeated appellant has never been permitted to appeal from other parts and so on piecemeal until he has obtained a review of the whole by successive appeals."

Vide first paragraph of § 232. Same estate in 187 N. Y. 253, on other points. *Matter of Wormser*, 51 App. Div. 441-445; *Matter of Kennedy*, 93 id. 27-30; *Matter of Stone*, 56 Misc. 247.

1909.

MATTER OF MARY LEWIS, 194 N. Y. 550, affirms, without opinion, 129 App. Div. 905, which reverses without opinion, 60 Misc. 643, on authority of *Matter of Lansing*, 182 N. Y. 238.

Moses Taylor died a resident May 23, 1882, and by his will gave a life interest in certain property to his daughter Mary Lewis. She died a resident May 14, 1907. Surrogate Beckett said, page 643: "That part of the will of decedent's father conferring upon her the power of appointment reads as follows: 'Fourthly: That upon the death of my children, and as they severally die, that my executors and trustees convey, pay and assign to the issue of such child the part or share held in trust for him or her in such proportions and at such time or times as he or she shall direct and appoint in and by his or her last will and testament, and in case of failure to make such appointment, then to such issue absolutely.' The decedent, by appropriate phraseology in her will, exercised the power in favor of her children. The latter filed with the appraiser an instrument in writing by which they elect to take the property under the will of their grandfather, the donor of the power, instead of under the appointment exercised by their mother, the decedent herein.

"The donor of the power having provided that the corpus of the estate should, upon the death of the donee of the power, be paid to such persons and in such proportions as she by her last will and testament should appoint, and the donee having by virtue of this power appointed the persons to whom the property should be paid, these beneficiaries derive their title to the property through the exercise of the power of appointment by decedent and not directly from the donor of the power. It was only upon the failure of the donee of the power to appoint that they could have taken under the will of the donor. In the *Matter of Lansing* (182 N. Y. 238), Vann, J., commenting on the *Cooksey*

case (182 N. Y. 92), said, respecting the donor's will in that case 'Moreover, title to the remainder was to vest in them only upon the failure of the mother to appoint.'"

The surrogate was *reversed*, and the transfer was held *not* taxable.

Vide subdivision 6 of § 220. Matter of Smith, 150 App. Div. 805-808; Matter of Haight, 152 App. Div. 228; Matter of Lowndes, 60 Misc. 506-507; Matter of Warren, 62 Misc. 444; Matter of Haggerty, 128 App. Div. 479, affirmed, without opinion, 194 N. Y. 550; Matter of Ripley, 122 App. Div. 419, affirmed, *per curiam*, 192 N. Y. 536; People *ex rel.* Ripley *v.* Williams, 69 Misc. 402; Matter of Ronalds, 129 App. Div. 900.

As to right of election vide Matter of Mitchell, N. Y. Law Journal, November 22, 1913, opinion quoted, *post*, page 777.

1908.

IN THE MATTER OF THE TRANSFER TAX UPON THE TRUST CREATED BY THE WILL OF OGDEN HAGGERTY, DECEASED, FOR THE BENEFIT OF ANNA K. SHAW AND REMAINDERMEN, 194 N. Y. 550, affirms, without opinion, 128 App. Div. 479.

Ogden Haggerty died August 30, 1875. The testator gave to his executors in trust all his residuary estate, to divide the same into three equal shares, one of such shares to be for the benefit of his wife and one for the benefit of each of his two daughters, Anna K. Shaw and Clemence H. Crafts. In respect to the share designed for the benefit of his daughter, Anna K. Shaw, one-half of such share he gave to her absolutely, and the remaining one-half to his executors in trust to pay the income and profits thereof to his said daughter, Anna K. Shaw, during her life, and on her death to pay and transfer the principal of one-half of such share to her issue, "and in case no such issue shall survive her, then to pay and transfer the said last mentioned one-half share to such person or persons as my said daughter Anna shall by her last will, or instrument in the nature thereof, executed in the presence of at least two witnesses, direct or appoint, and in default of such will or appointment, then to pay and transfer the said last mentioned one-half share to my said daughter Clemence H. Crafts, if she shall survive the said Anna, or in case she shall not survive the said Anna, then to the issue then living of the said Clemence." Both of the testator's daughters survived him. Anna K. Shaw had no children and died without issue on the

17th of March, 1907, leaving her sister, Clemence H. Crafts, surviving.

Anna K. Shaw, by her will executed the power of appointment in favor of her sister, the said Clemence H. Crafts. After the will of Mrs. Shaw was admitted to probate Clemence H. Crafts, by a formal instrument in writing, duly verified, claimed the trust funds exclusively under the will of her father, Ogden Haggerty, and in no respects through the action of her said sister, and she refused to take under the alleged appointment.¹

The court say, page 482: "It is settled that when an estate is vested under a will made before the Transfer Tax Statutes were enacted, no tax can be imposed. (Matter of Pell, 171 N. Y. 48; Matter of Lansing, 182 id. 238.) So, if Clemence H. Crafts took under the will of her father, her interest in the estate was not taxable; while, if she took under the power of appointment, contained in the will of her sister, the transfer was taxable. The question to be determined, therefore, is whether she received this estate under the will of Ogden Haggerty, admitted to probate in 1875, or under the will of her sister, which was admitted to probate on the 16th of May, 1907."

Held, that the transfer was not taxable.

Vide subdivision 6 of § 220.

¹ Matter of Chapman, 133 App. Div. 337-339, appeal dismissed, without opinion, 196 N. Y. 561; Matter of Smith, 150 App. Div. 805-808; Matter of Haight, 152 App. Div. 228; Matter of Lewis, 60 Misc. 643-644, reversed, 194 N. Y. 550; Matter of Warren, 62 Misc. 444; Matter of Ripley, 122 App. Div. 419, affirmed, per curiam, 192 N. Y. 536; People *ex rel.* Ripley v. Williams, 69 Misc. 402; Matter of Ronalds, 129 App. Div. 900; Matter of Mitchill, N. Y. Law Journal, November 22, 1913, opinion quoted page 777.

1909.

MATTER OF ALICE K. BROWNE, 195 N. Y. 522, dismissed appeal from 127 App. Div. 941, which affirmed, without opinion, order of surrogate.

Testator died a resident of Washington on March 21, 1905. Surrogate Thomas in Matter of Porter, 67 Misc. 19, said: "In the Estate of Alice Key Browne, my memorandum, published in the New York Law Journal of May 25, 1907, reads as follows: 'Estate of Alice Key Browne—The appeal was taken in time. The appraiser acted correctly in pro rating debts due to creditors not domiciled in this State and funeral expenses (Matter of

Doane, N. Y. Law Journal, March 12, 1903). He was also correct in pro rating the annuities or gifts of income which are directed by the will to be paid generally out of the income of the residuary estate given by the will to the executor in trust. The executor, however, is entitled to have all expenses of administration, including the commissions allowable to him in the domiciliary jurisdiction, also pro rated, and for this purpose the matter will be remitted to the appraiser if counsel are unable to agree upon the amount.' * * *

"In the Appellate Division the order was affirmed without opinion (Matter of Browne, 127 App. Div. 941), and in the Court of Appeals (195 N. Y. 522) the appeal was dismissed with the following memorandum:

"'Per curiam—While we would have no difficulty in disposing of this appeal by affirming the order on the merits if the appeal was properly before us, we are of the opinion that the order appealed from is interlocutory, and therefore the appeal must be dismissed, with costs.'

"The exact basis upon which the pro rata allowances should be made was, however, not litigated or determined in that case. In view of the fact that the rule established in the Grosvenor case, 193 N. Y. 652, for the deduction of New York debts is very liberal to the estates of non-resident decedents, I think the deduction to be made for debts owing to non-resident creditors, mortuary expenses, commissions on property without the State and other administration expenses in respect to such property, should be in the proportion which the net New York estate (after all deductions are made for debts owing to resident creditors, New York commissions and New York administration expenses) bears to the entire or gross estate, wherever situated. The trustee's commissions, which are the subject of the fourth ground of appeal will be allowed pro rata to the extent here indicated."

Vide subdivision 2 of § 220 and § 243. In Matter of Badger, N. Y. Law Journal, June 8, 1912, an application was denied by Surrogate Cohalan to vacate order fixing tax so as to include deductions in accordance with the rule in the Porter case, *supra*. The surrogate held that the failure of appraiser to make deductions was an error of law which could be corrected only by appeal.

1908.

MATTER OF JAMES HENRY MERGENTIME, 195 N. Y. 572, affirms, on opinion below, 129 App. Div. 367.

Testator died a resident July 26, 1906.

Held, that a legacy of \$1,000 to Metropolitan Museum of Art was not taxable, on ground that it was an educational institution.

Vide § 221. *Matter of Arnot*, 145 App. Div. 708-712, affirmed, without opinion, 203 N. Y. 627; *Matter of McCormick*, 206 N. Y. 100; *Matter of Field*, 71 Misc. 396-397, affirmed, without opinion, 147 App. Div. 927; *Matter of Allen*, 76 Misc. 88-91; *Matter of Saunders*, 77 Misc. 54-60, affirmed, without opinion, 156 App. Div. 891; *Matter of de Peyster*, N. Y. Law Journal, January 21, 1913, affirmed, without opinion, 156 App. Div. 938; *Matter of Seligman*, N. Y. Law Journal, July 19, 1913, opinion quoted sub *Educational Corporation*, page 677.

1909.

MATTER OF POLLY STRAIL, 195 N. Y. 575, affirms, without opinion, 128 App. Div. 908, which affirmed, without opinion, order of Surrogate of Onondaga County, no opinion.

Intestate died a resident December 11, 1896. On December 17, 1897, a transfer tax was duly assessed, and same was not paid. On June 23, 1898, the administrators, not having received a sufficient sum from the personal estate to pay the creditors of and claims against the estate of said decedent, obtained an order in the Surrogate's Court to sell the real estate of which the said Polly Strail died seized, for the payment of her debts; and on October 27, 1898, sold the said real estate to John Kelly and John Kelly, Jr., who purchased it without any knowledge of said transfer tax.

The tax imposed in the transfer tax proceedings remained unpaid and in May, 1904, the District Attorney of Onondaga County, at the request of the State Comptroller, and under the provisions of § 235 of the tax law, instituted a proceeding in the Surrogate's Court citing the respondents to show cause why the tax should not be paid.

Held, "that said John Kelly and John Kelly, Jr., are not liable for payment of said transfer tax upon the estate of Polly Strail, deceased, or any part thereof; and that the same or any part

thereof was not a lien upon the said real estate of Polly Strail, deceased, purchased by them."

Vide §§ 224, 235 and 245. The practice quite generally is for a purchaser of real estate to insist upon transfer tax proceedings. The certificate of the state comptroller under the last paragraph of § 236 should be procured and recorded. As to when such certificate cannot be procured because of insufficient assets to pay tax vide *Matter of Meyer*, 209 N. Y. 386.

Vide *Matter of Strang*, 117 App. Div. 796; *Brown v. Lawrence*, Park Realty Co., 133 App. Div. 753; *Kitching v. Spear*, 26 Misc. 436.

Vide § 447 of Code of Civil Procedure as amended by Laws 1911, chapter 24.

1909.

MATTER OF OTTO LIND, 196 N. Y. 570, affirms, without opinion, 132 App. Div. 321.

Intestate, a native of Sweden, died on November 17, 1904, in the City of New York, leaving a small amount of money in a savings bank, and, so far as appears, no widow or next of kin in this State. Inquiry failed to disclose any knowledge of him, his family or next of kin. Letters of administration were issued to the public administrator, whereupon the Comptroller of the State of New York applied to the surrogate to have an appraisal of the property subject to a transfer tax.

The court say, page 322: "The only uncertainty as to the ownership of this property depends upon the fact as to whether the deceased left next of kin. The presumption is that the deceased left next of kin, but there is no presumption that he left a widow or descendants. It is presumed, therefore, that the property vested in the next of kin of the deceased, and is, therefore, taxable under § 220 of the Tax Law (as amd. by Laws of 1897, chap. 284), and as it does not appear that it is exempt under § 221 of the Tax Law (as amd. by Laws of 1903, chap. 41), the tax imposed by subdivision 6 of § 220 (as amd., *supra*) applies and it is taxable at the rate of five per centum."

Vide subdivision 2 of § 221a.

1909.

MATTER OF ELLEN M. MAVERICK, 198 N. Y. 618, affirms, without opinion, 135 App. Div. 44.

Testatrix, a resident, who died January 28, 1908, by her will gave to the trustees of Greenwood Cemetery the sum of \$250 in trust to invest the same and to expend the income and interest

derived therefrom in keeping her burial plot "in as good condition and repair as the said income will permit."

The court say, page 45: "It is well established and is not disputed that the funeral expenses of a decedent are exempt from tax. As a part of the burial expenses thus exempt it has been repeatedly held that the sum expended for a burial plot or for the erection of a monument was also exempt. (Matter of Edgerton, 35 App. Div. 125; *affd.*, 158 N. Y. 671; Estate of Millward, 6 Misc. Rep. 425; Matter of Liss, 39 *id.* 123; Code Civ. Proc., § 2749.) By a close analogy of reasoning it has until recently been held that the reasonable cost of keeping a burial plot and monument in order was a funeral expense and exempt from tax. (Matter of Vinot's Estate, 7 N. Y. Supp. 517, cited in Matter of Edgerton, *supra.*) If the cost of a burial plot and monument is properly included in the burial expenses, I can see no reason why the reasonable cost of keeping them in decent repair is not also properly a part of the burial expenses."

1910.

MATTER OF PAUL A. E. MAJOT, 199 N. Y. 29.

The decedent was a citizen of France and on June 30, 1885, married the respondent in that country and they migrated to the United States, where decedent died on December 7, 1907, a resident of the State of New York, intestate, owning real property therein and possessed of certain personal property. The marriage in France was without express ante-nuptial contract. The widow claimed that by virtue of her marriage with the deceased in France, under the law giving her community of interest in whatever property her husband had or should acquire, she is entitled to one-half of his real and personal property free from the transfer tax imposed by the laws of the State of New York.

The court say, page 31: "No express ante-nuptial contract existed between them. He left no will and his widow has been duly appointed administratrix of his estate. * * * (Page 34.) Our attention has been called to no case in this State in which our courts have considered the question now presented. * * *

"(Page 32.) As to whether the community interest of a wife in the property of her husband under the French law is such as to constitute her the present and continuing owner during their

married life of an undivided one-half interest in his personal property acquired during his residence in France we do not now deem it necessary to determine; for, as we understand, all of the decedent's property, both real and personal, of which he died seized or possessed, was acquired after the removal of himself and wife to this State.

"While it must be conceded that some conflict exists in the decisions of courts in foreign jurisdictions, we have no hesitancy in reaching the conclusion that, as to the property acquired by the decedent here during his residence with his wife in this State, it is controlled by our laws and upon his death it is transferred within the meaning of our tax laws."

Vide subdivision 1 of § 220; Matter of Baker, 83 App. Div. 530, affirmed, on opinion below, 178 N. Y. 575; Matter of Turner, 82 Misc. 25-28.

1910.

MATTER OF MARTHA POTTER, 199 N. Y. 561, affirms, without opinion, 139 App. Div. 905, which affirms, without opinion, the order of surrogate, New York Law Journal, April 16, 1909.

Testatrix died a resident October 28, 1907. Held, that the value of the life interest should be computed by the Superintendent of Insurance, under the provision of § 230 upon a basis of five per cent, irrespective of what the income of the trust fund might be.

Vide third paragraph of § 230 and second sentence of § 231. As to life estates, Matter of Maresi, 74 App. Div. 76-78; Matter of Jones, 28 Misc. 356, affirmed 172 N. Y. 575; Matter of White, 208 N. Y. 64.

As to tables employed by superintendent of insurance vide *post*, page 581.

1910.

MATTER OF MARIA B. CHAPMAN, 199 N. Y. 562, affirms, without opinion, 138 App. Div. 923, which affirms, on the authority of Matter of Chapman, 133 App. Div. 337, the order of surrogate, 61 Misc. 593. Same case in 196 N. Y. 561, no opinion.

John Davol, the father of Maria B. Chapman, died in 1878. By his will the fund, left in trust to the daughter for life, was at her death to go to such persons as she might lawfully appoint to

receive it. But the will further provides as follows: "If such daughter shall fail to lawfully exercise said power of disposition by her will, or if for any cause a reversion should occur as to the same or any part thereof, they (the trustees) shall pay the same to the lawful issue of such daughter, in the same manner as if such daughter had died intestate owning the same."

At the date of his death his daughter had three sons, Edwin M. Chapman, John D. Chapman and Harold W. Chapman. Subsequently a fourth son was born, Marvin A. Chapman, and all of these sons survived her, she dying July 28, 1908. The court say, at page 339 of 133 App. Div.: "Under Mrs. Chapman's will, although she in form executed her power of appointment, it did not effectively transfer any property whatever for her children took from their grandfather precisely what she attempted to give them, and nothing was added to or taken away from the gift by the exercise of the power through her will. * * * It is true that there was a provision in her will that one of these parts should be held in trust for each of her sons until they attained the age of twenty-eight years (afterwards changed by her codicil so that the period of the termination of the trust was twenty-five years). Each of her sons was more than twenty-five years of age at the time that she died. * * * (Page 340.) It has been heretofore suggested that the estate which her sons took upon the death of their grandfather, John Davol, was a vested estate in remainder. Even if it were contingent, it was an interest acquired at the instant of their grandfather's death, and became a property right which could not be cut down by the subsequent imposition of a transfer tax. (Matter of Lansing, 182 N. Y. 238.)

"The suggestion has been made that the children of Mrs. Chapman declined to elect whether they would take under their grandfather's will, or under the power of appointment in their mother's will. The election need not be in any particular form, and the position taken by them in connection with the imposition of the transfer tax is a sufficient election if one were absolutely necessary."

Vide Matter of Smith, 150 App. Div. 805-808; Matter of Haight, 152 App. Div. 228; Matter of Lewis, 60 Misc. 643, reversed in 194 N. Y. 550; Matter of Warren, 62 Misc. 444; Matter of Ripley, 122 App. Div. 419, affirmed per curiam, 192 N. Y. 536; People *ex rel.* Ripley *v.* Williams, 69 Misc. 402.

Matter of Mitchill, N. Y. Law Journal, November 22, 1913, opinion quoted page 777.

1910.

MATTER OF DANIEL B. FEARING, 200 N. Y. 340, affirming 138 App. Div. 881.

Daniel B. Fearing, a resident of New York, died in 1870, leaving a will by which he created a trust for the benefit of his daughter, Amey R. R. Sheldon, during her life, with a power of appointment to her as to the principal of the trust estate to be exercised by her last will and testament. She died on January 29, 1908, being then a resident of the State of Rhode Island, leaving a will, in which she exercised the power of appointment conferred upon her by her father's will.

The court say, page 342: "Upon this appeal by the Comptroller of the State it is argued, in the first place, that the trust property which was appointed by Mrs. Sheldon's will 'was property of a resident decedent, * * * and consequently taxable here, wheresoever situated.' In the second place, it is argued that bonds secured by mortgages of real estate situated in this State, of which the trust estate was principally composed, 'although the instruments evidencing them are outside of the State, constitute taxable property.' * * *

"Mr. Fearing died many years before the enactment of any statute charging the succession to estates of deceased persons with a tax. After such an enactment was placed upon the statute books, it was not until 1897 that property, passing through the execution of a power of appointment created by will, was subjected to Taxation when the will had become operative before the passage of the Tax Law. * * * (Page 343.) Such an appointment to others was, for the purposes of taxation, to be deemed the equivalent of a bequest, or devise, by the donee of the power of property belonging to the donee. Prior to this amendment of the Transfer Tax Law, there was no provision for the taxation of transfers under powers of appointment; but, with the passage of the amendment, the privilege of exercising the power by will was subjected to the charge of a tax upon the right of the appointees to take. Whereas, previously, the source of the appointee's right of succession was deemed to be in the will creating the power of appointment; thereafter it was deemed to be in the execution of the power itself. The actual transfer effected by the exercise of the power was to be taxed. The Legislature, in the exercise of its control over testamentary dispositions of property, could validly burden

such transfers with a tax, regardless of the technical source of the title of the appointee under the rules of the common law (see *Matter of Dows*, 167 N. Y. 227; *Matter of Delano*, 176 id. 486). As Mrs. Sheldon, in making a will, exercised a privilege granted by the laws of her own State, and not by those of this State, the transfers of property effected thereby were beyond the reach of our tax laws. The State had no dominion over the property transferred."

In reading this portion of the opinion it must be borne in mind that it is *dictum* in so far as it relates to property within the State of New York at the time of the donee's death. By reference to the report of the proceeding below, 138 App. Div. 881-883, it will be noted that the Appellate Division upheld the taxation of the transfer under the power of appointment of a deposit in the Union Trust Company of New York City evidenced by a certificate of deposit. An examination of the printed papers on appeal, page 13, shows that the said certificate of deposit was physically located at Newport at the time of the decedent's death.¹ No appeal was taken by the estate to the Court of Appeals.

The court further say, page 344: "The second proposition urged by the comptroller presents no new question. It is covered by our decision in *Matter of Bronson* (150 N. Y. 1.) The contention that, as the mortgages, which were given to secure the payment of the bonds transferred by Mrs. Sheldon's will, were of real estate in this state, the bonds represented investments taxable here, was disposed of by that case. The provision of the Transfer Tax Law, which was then under consideration, was that, 'a tax shall be and is hereby imposed upon the transfer of any property * * * when the transfer is by will, or intestate law, of property within the state, and the decedent was a non-resident of the state at the time of his death.' (L. 1892, ch. 399, section 1.) This provision of the law has not been changed since its enactment in 1892.² * * * Whether the bonds are secured, as in the *Bronson* case, by mortgages of corporate property, or, as in the present case, by mortgages of the property of individuals, they represent, equally, debts of their makers, which, as choses in action, under the general rule of law, are inseparable from the personalty of the owner. Under that rule, as it was said in the *Foreign Held Bonds Case* (15 Wall. 300-320), of the bonds there, they 'can have no locality separate from the parties to whom they are due,' and the legal

situs of the indebtedness, which they represent, is fixed by the domicile of the creditor. The legal title to these bonds in question was transferred by force of the laws of Rhode Island. As their legal and actual situs was in a foreign state, upon no theory were they within the operation of our Transfer Tax Law."

¹ As to certificates of deposit vide *Matter of Hewitt*, 181 N. Y. 547, *supra*, page 301.

² Amended by chapter 732, Laws of 1911, in effect July 21, 1911, vide §§ 220 and 243.

Matter of Tiffany, 143 App. Div. 327-329, affirmed on opinion of McLaughlin, J., below, 202 N. Y. 550, appeal pending in United States Supreme Court.

As to exercise of power of appointment, vide *Matter of Kissel*, 65 Misc. 443, affirmed, without opinion, 142 App. Div. 934; *Matter of Frazier*, N. Y. Law Journal, March 28, 1912, opinion quoted *supra*, page 778, and *Matter of Thomas*, 39 Misc. 136 (1902), which is apparently overruled by the reasoning adopted in the cases of *Kissel*, *Fearing* and *Frazier*, *supra*. Vide etiam *Matter of Lord*, 111 App. Div. 152-154, affirmed, without opinion, 186 N. Y. 549, sustained in 211 U. S. 477, *sub nom.* *Beers v. Glynn*; etiam *Matter of Seamen*, N. Y. Law Journal, December 5, 1913, opinion quoted, *post*, page 780.

As to exercise of power of appointment since the 1911 amendment by non-resident donee, vide *post*, page 781.

1910.

MATTER OF CHARLES B. WHITING, 200 N. Y. 520, affirms without opinion, 139 App. Div. 905, which affirms, without opinion, 69 Misc. 526.

Testator died a resident of Connecticut on April 11, 1908. Surrogate Thomas said: "In the case of a non-resident decedent it is only the personal property situated in this State that is the subject of transfer tax. The purpose of the appraisal is, therefore, to determine the value of such property, and such value must be determined as of the date of death of the decedent. It is only as incidental to this purpose, and in order to apportion between the property in this State and the property elsewhere the debts and expenses of administration, that an inquiry is made into the value of the property located outside of this State. Where it is shown, as it is in this case, that the property outside of this State has been used by the executor in the exercise of his acknowledged right of election to pay the pecuniary legacies, that it has proved sufficient to pay all of them, and that all of the property in this State passes to a residuary legatee who is in

the class of persons taxable at one per cent., the tax must be imposed at that rate."

Subdivision 3 of § 220 was added to the statute by chapter 310, Laws of 1908, in effect May 18, 1908. *Matter of Porter*, 67 Misc. 19, affirmed, 148 App. Div. 896; *Matter of James*, 144 N. Y. 6; *Matter of Ramsdill*, 190 N. Y. 492; *Matter of McEvan*, 51 Misc. 455; opinion of Comptroller, January 20, 1913, in 1 State Department Reports 605, quoted *supra* page 152.

1911.

MATTER OF MARIA B. STARBUCK, 201 N. Y. 531, affirms, on opinion of Thomas, J., below, 137 App. Div. 866, which affirms 63 Misc. 156.

Intestate died a resident on June 1, 1907.

The question involved was, is an estate by the curtesy taxable? The court say, page 867: "Section 220, so far as here pertinent, provides for a tax upon the 'transfer of any property * * * or of any interest therein or income therefrom, in trust or otherwise, to persons * * * in the following cases: 1. When the transfer is by will or by the intestate laws of this State from any person dying seized or possessed of the property.' The words 'intestate laws' refer to the statutes governing the descent and distribution of a decedent's property. Section 280 of the Real Property Law, in force when chapter 368, Laws of 1905, was enacted, provided: 'This article (the one relating to descent) does not affect * * * tenancy by the curtesy or dower.' That statute is the law's will for the disposition of property when its owner dies without a will. Upon inspection to discover what interest it transfers, it is found that it does not transfer an estate by the curtesy, but disclaims any effect upon such estate. That is, it leaves it untouched as a matter that does not concern it. Hence the taxing statute does not include it."

Matter of Green, 144 App. Div. 232, and *Matter of Andrews*, N. Y. Law Journal, February 21, 1912, opinion quoted sub *Husband*, page 718. Chapter 732, Laws of 1911, in effect July 21, 1911, added to § 243 the following sentence: "The words 'the intestate laws of this state,' as used in this article, shall be taken to refer to all transfers of property, or any beneficial interest therein, effected by the statute of descent and distribution and the transfer of any property, or any beneficial interest therein, effected by operation of law upon the death of a person omitting to make a valid disposition thereof, including a husband's right as tenant by the curtesy or the right of a husband to succeed to the personal property of his wife who dies intestate leaving no descendants her surviving."

Query as to the effect of this amendment in non-resident estates, vide *supra*, page 36.

In *Matter of Matilda Beckhardt*, N. Y. Law Journal, June 7, 1913, it was held that husband's estate in curtesy did not vest until death of wife, and that such estate was subject to tax where wife died after amendment of chapter 732, Laws of 1911.

1911.

MATTER OF CHARLES C. TIFFANY, 202 N. Y. 550, affirms, on opinion of McLaughlin, J., below, 143 App. Div. 327, appeal pending in United States Supreme Court.

Testator died a resident of Connecticut on August 20, 1907. He died owning certain promissory notes which then, and for some time prior thereto had been in a safe deposit box in the city of New York. With two exceptions the notes were made by non-residents, and payment of all of them was secured by property outside of the State of New York.

Held, that all the notes were subject to the transfer tax, the court saying, page 329: "So far as this court is concerned, the identical question here presented has already been passed upon. (*Matter of Wall*, 105 App. Div. 643.) There, promissory notes made by a non-resident to a non-resident, were, at the time of the latter's death, found in his safe deposit box in this State. A majority of the court held that such notes were property having a situs in this State and, therefore, liable to taxation. (See, also, *Matter of Fearing*, 200 N. Y. 340.)

"But it is said that since the decision in *Matter of Wall* (*supra*) the Supreme Court of the United States has decided (*Buck v. Beach*, 206 U. S. 392) that promissory notes, situated as the notes here in question, are not taxable. I do not think that decision is applicable to the question here presented, and if so, is distinguishable. The *Buck* case simply held that the State of Indiana did not have the power to impose a general tax upon promissory notes made by a non-resident, payable to a non-resident, simply because they were present in the State. There, the attempt was to levy a tax upon property, while here it is to impose a tax upon the transfer or right of succession. Mr. Justice Peckham, who delivered the opinion, was careful to point out the distinction. He said: 'Cases arising under collateral inheritance tax or succession tax acts have been cited as affording foundation for the right to tax as herein asserted. The foundation upon which such acts rest is different from that which

exists where the assessment is levied upon property. The succession or inheritance tax is not a tax on property, as has been frequently held by this court, *Knowlton v. Moore*, 178 U. S. 41, and *Blackstone v. Miller*, 188 U. S. 189, and, therefore, the decisions arising under such inheritance tax cases are not in point.'

"In *Blackstone v. Miller*, referred to by Mr. Justice Peckham, the question was whether a deposit in a New York bank, belonging to a non-resident decedent, was subject to tax under the New York Transfer Tax Act, and the claim was there made that such deposit was a mere credit and that the situs of the property was not in the State. Mr. Justice Holmes, in disposing of the question, said: 'We perceive no better reason for denying the right of New York to impose a succession tax on debts owed by its citizens than upon tangible chattels found within the State at the time of the death. The maxim *mobilier sequuntur personam* has no more truth in the one case than in the other. When logic and the policy of a State conflict with a fiction due to historical tradition, the fiction must give way. * * * Bonds and negotiable instruments are more than merely evidences of debt. The debt is inseparable from the paper which declares and constitutes it. * * *'"

Vide subdivision 2 of § 220 and § 243. As to definition of "tangible" property vide *Matter of Dusenberry*, 2 State Department Reports, 501.

For present law vide *supra*, page 133.

1911.

MATTER OF MAX FREUND, 202 N. Y. 556, affirms, on opinion of McLaughlin, J., below, 143 App. Div. 335.

Testator died January 27, 1909. On the second Monday of January, 1909, certain real estate in the city of New York appeared in the annual records of taxation against decedent, who died owning such real estate, and the taxes thereon, amounting to \$3,020.47, were thereafter fixed for the year 1909 and were paid by his executrix. She claims they were a debt of her testator, and for that reason should have been deducted before a transfer tax was imposed.

The court say, page 336: "The testator died only a few days after the real estate in question was assessed for the purpose of taxation and upwards of two months prior to the first day of April, during which period such assessment might have been re-

duced or corrected. [Greater N. Y. Charter (Laws of 1901, chap. 466, § 892, as amd. by Laws of 1903, chap. 454.)] * * *

“(Page 337.) At the time of the testator’s death there was no existing debt, because the taxes had not then been ascertained. All that had been done up to that time was the fixing of valuation, which, unless corrected in the manner pointed out in the statute, constituted the basis upon which the tax was thereafter to be assessed. It was not until the first day of April following the testator’s death that the books for correction of taxes were closed. Up to that time the assessment might be changed and it was only upon the amount of the assessment as existing at the time of the closing of the books that the tax was to be levied. The assessment of valuations for purposes of taxation and the assessment of taxes constitute two different things. The first does not create an indebtedness, while the latter does. * * * In *Buckhout v. City of New York* (176 N. Y. 363) the court said: ‘Taxation cannot create a debt until there is a tax fixed in amount and perfected in all respects. It is not enough to lay the foundation, but the structure must be built. There cannot be a complete tax upon real estate until it is so perfected as to become a lien, because until then the amount cannot be known.’ * * *

“(Page 338.) For the foregoing reasons, as well as those stated in *Matter of Maresi* (74 App. Div. 76), where a similar conclusion was reached by the Appellate Division of the Second Department, I am of opinion that the order appealed from is right and should be affirmed.”

Vide *Matter of Brundage*, 31 App. Div. 348. Subdivision 2 of § 2719 of Code of Civil Procedure interpreted in *Matter of Babcock*, 115 N. Y. 450-456, and also in *Matter of Hoffman*, 42 Misc. 90; *Matter of Liss*, 39 Misc. 123.

New York City personal taxes assessed for the year 1912 allowed as a deduction in estate of decedent who died November 7, 1911. *Matter of Dormitzer*, N. Y. Law Journal, February 6, 1913.

1911.

MATTER OF MATTHIAS H. ARNOT, 203 N. Y. 627, affirms, without opinion, 145 App. Div. 708.

Testator died a resident February 15, 1910. The surrogate held that certain devises, bequests and transfers by his will to a corporation to be formed known as the Arnot Art Gallery were

not taxable (71 Misc. Rep. 390), and from that decision this appeal was taken by the Comptroller. The court discuss the clauses of the will, and say, page 717: "Certainly a study by any person or persons with a love for art and a desire to create such a love of the pictures alone bequeathed by this testator could not but be an education. * * * What is this 'Arnot Art Gallery' thus provided for and actually incorporated within the period limited by the will if not an 'educational corporation'?" * * * No pay days as has the 'Metropolitan Museum of Art,' no necessary passes for teachers, but free to all, teacher and taught, 'under proper (and) reasonable regulations' at all times. It is and must be a great 'educational' institution. The term 'educational' has been given by our courts a broad and liberal construction and I think the term as used in the statute is broad enough to cover this Arnot Art Gallery."

Vide first sentence of § 221. Matter of Saunders, 77 Misc. 54-63, affirmed, without opinion, 156 App. Div. 891; Matter of de Peyster, N. Y. Law Journal, January 21, 1913, opinion quoted sub Educational Corporation, page 676, affirmed, without opinion, 156 App. Div. 938.

As to corporations to be formed vide Matter of Robinson, 80 Misc. 458, and Matter of Neustadter, N. Y. Law Journal, August 16, 1913, opinion quoted sub Exemptions, page 688; Matter of McCartin, N. Y. Law Journal, December 5, 1913, opinion quoted, page 608.

1912.

MATTER OF WILLIAM H. BURGESS, 204 N. Y. 265.

Testator died July 11, 1909. The court say, page 267: "The will of the deceased, so far as material to the controversy before us, after directing his executors to set aside a fund of \$50,000 for the benefit of each of his daughters, the income thereof to be paid to said daughter during her life, gave all the residuary estate to his executors in trust to pay the net income to the testator's wife during her life or widowhood, and upon her death or remarriage he directed his said executors to divide said trust fund (with the exception of the sum of \$10,000) 'into as many shares as I may have daughters living at the time of such division, and their living issue, collectively, of any then deceased daughter, and to set aside one share for the issue collectively of any then deceased daughter, and pay over the said share to such issue in equal shares, so that each set of issue will receive one share, per stirpes, and to set aside one share for

the benefit of each of my said daughters then living and to have and to hold the same IN TRUST, nevertheless, to and for the following uses and purposes, namely:—To invest and keep the same invested, to receive the rents, issues and profits, and to pay the net rents, issues and profits so received to the daughter for whose benefit the said share shall be so set aside, during the term of her natural life and on her death, to pay over the principal so held in trust, together with the sum of Fifty thousand dollars also set apart for her benefit as provided by the Third clause of this will to such person and in such manner as she may in and by her last Will and Testament properly executed by her duly appoint or in default of such appointment, either as to the whole or any part thereof, then to the extent to which no appointment shall be made, to her issue her surviving per stirpes, or in default of both such appointment either as to the whole or any part thereof, and of issue, then to the extent to which no such appointment shall be made, to such persons as would be entitled to receive the same if she had died intestate possessed of the principal of said trust estate (and for the purposes of ascertaining the persons who would be so entitled to receive the same, the entire principal of the trust estate shall in that event be deemed to be personal property).’

“The testator left his widow and three daughters him surviving. The surrogate held the remainders in the trust funds of \$50,000 each to be subject to taxation only at the respective deaths of the equitable life tenants. He held that the remainder in the residuary estate after the death of the wife to be presently taxable and imposed the tax at the rate of five per cent. The executors appealed from so much of the decree as imposed a tax of five per cent upon the remainder of the residuary estate. No appeal was taken by the comptroller.

“The question presented in this appeal is not free from doubt. Its determination depends on what section of the Tax Law is deemed to be applicable to the case. Under the statutes that first imposed taxes on succession either under testamentary dispositions or intestacy laws, it was held that contingent remainders or remainders technically vested, but subject to be divested, and, therefore, in the broad sense, contingent, could not be taxed until they indefeasibly vested. (Matter of Curtis, 142 N. Y. 219.) Subsequently it was held that the exercise of a power of appointment did not subject the property passing thereunder to a succession tax, where the

source of the power was a will prior to the enactment of the Transfer Tax Law. But in 1897 the statute was changed so that § 220, subd. 6, now provides: 'Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property made either before or after the passage of this chapter, such appointment when made, shall be deemed a transfer taxable under the provisions of this chapter in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will.' * * * (Page 269.) Still later § 230 was amended so as to provide that 'when property is transferred in trust or otherwise, and the rights, interests or estates of the transferees are dependent upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended or abridged, a tax shall be imposed upon said transfer at the highest rate which, on the happening of any of the said contingencies or conditions, would be possible under the provisions,' of the act, which tax is made payable forthwith by the executors or trustees out of the property transferred.¹ The amendment of these two sections abrogated the rules declared in the decision cited. In *Matter of Vanderbilt* (172 N. Y. 69) the validity of § 230 was upheld and it was decided that under its provisions the tax was immediately payable out of the estate, to be computed at the highest rate at which, under any contingency provided in the will, the property might be taxable. The will in that case gave no power of appointment. Later the case of *Matter of Howe* (86 App. Div. 286) arose. There the gift was in trust to one Leavitt Howe for life, remainder to such persons as by his last will he might appoint. It was held by the Appellate Division, Justice Willard Bartlett, then in the Supreme Court, writing the opinion, that the amendment of § 230 did not repeal or render nugatory the provisions of § 220 that property passing under a power of appointment should be taxed on the transfer by the exercise of the power of appointment the same as if the donee of the power was the owner of the property, and that hence the remainders were not taxable until the death of such donee. The decision was affirmed by this court on that opinion. (176 N. Y. 570.)

"Under that authority it is clear that the decision of the surrogate that the remainders in the several \$50,000 trust funds were not presently taxable was correct. The embarrassment as

to the taxation of the remainders in the residuary estate is caused by the fact that it is not certain whether there will be any power of appointment to be exercised over the whole or any part of the residuary estate. The executors are to divide the property into as many shares as there may be living daughters or issue of a deceased daughter at the death of the widow. If at such time any daughter shall have died leaving issue then surviving, such issue will inherit directly under the will and not by virtue of the exercise or non-exercise of any power of appointment, and such inheritance will comprise a part or the whole of the property, dependent upon whether any of the other daughters shall survive that period. If none of the daughters shall live until that time, none will have any power of appointment. The result would be that if the rule of *Matter of Howe* (*supra*) was applied to the present case the remainders might escape taxation altogether. For that reason the learned courts below held that the rule applies only where there is an absolute gift of a power of appointment, so that the property is certain to pass either under the exercise or non-exercise of the power of appointment, and that the case before them was not within the rule. In this view we concur.

“But the question still remains at what rate this remainder is taxable. The courts below have imposed the tax at the rate of five per cent, on the assumption that under the terms of the will the property may pass to collaterals or strangers, transfers to whom are taxable at that rate.”

The court construed the will and say, page 271: “It follows that the testator died intestate as to the remainder in the contingency of no daughter nor issue of daughter surviving the widow, and that that contingent interest passed immediately on his death to his widow and daughters. Therefore, in no contingency can any person succeed to the remainder under the will—apart from the exercise or non-exercise of the power of appointment—except the lineal descendants of the testator taxable at the rate of one per cent.”

Vide subdivision 6 of § 220.

¹ Sixth paragraph of § 230 and last two paragraphs of § 241, amended by Laws of 1911, chapter 800, in effect July 28, 1911; *Matter of Leuff*, 1 State Department Reports, 567; *Matter of Billingsley*, id. 569; *Matter of Everett*, 3 id. 450, opinion quoted, *post*, page 824.

Matter of Smith, 80 Misc. 140; *Matter of Armstrong*, N. Y. Law Journal, February 20, 1912, opinion quoted, page 733; *Matter of Simmons*, id., June 14, 1912, opinion quoted page 829; *Matter of Litchfield*, id., July 2,

1913, opinion quoted page 772; *Matter of Lane*, 157 App. Div. 694-697; *Matter of Turner*, 82 Misc. 25-26.

1912.

MATTER OF MARTHA M. READ, 204 N. Y. 672, affirms, without opinion, 145 App. Div. 920, which affirms, without opinion, an order of New York County Surrogate's Court, *New York Law Journal*, November 12, 1910.

Testatrix died a non-resident, September 25, 1904. Application under § 223 to reduce interest on tax from ten per centum per annum to six per centum on the ground that the delay in the payment of the tax was unavoidable because of the fact that the executors and trustees, all of whom were non-residents, had no actual or constitutional knowledge of the existence of the Transfer Tax Law and therefore had not known that the estate was subject to such a tax.

Surrogate Thomas, in denying the application, said: "The qualified power given to me by the Legislature to remit the penalty upon the transfer tax does not justify my granting the present application."

Vide *Matter of Cornell*, 170 N. Y. 423-426; *People v. Prout*, 53 Hun, 541, affirmed, without opinion, 117 N. Y. 650; *Matter of Stewart*, 131 N. Y. 274-285; *Matter of De Graef*, 24 Misc. 147-150; *Matter of Brower*, N. Y. *Law Journal*, July 15, 1913, opinion quoted sub *Interest*, page 722.

1911.

MATTER OF SUSAN S. PATTERSON, 204 N. Y. 677, affirms, without opinion, 146 App. Div. 286.

Testatrix died a resident September 27, 1909. Some six years before she died she executed a deed of trust, by which she transferred to three trustees therein named all of her property except her real estate in the town of Westfield, her household furniture and chattels in her home, carriages, harnesses and live stock on said real property and also her wearing apparel and jewels. Contemporaneously she made her will, disposing of her residuary estate practically in the same shares to the same people who were beneficiaries under the trust deed, and naming as executors the same persons who were made trustees under the trust deed. The trust deed provided, page 288: "Whereas the party of the first part is possessed of divers properties, which

she desires to transfer, assign and convey to the Trustees for the purpose of taking possession thereof and title thereto, collecting the income therefrom, and applying such income in part to the use and benefit of the party of the first part during her life, and any residue of the income to be distributed to certain beneficiaries, and upon the decease of party of the first part the entire estate to be distributed to certain beneficiaries." The trustees were directed by the deed of trust upon the death of the grantor to convert all the assets of the trust estate into money and out of the proceeds to pay one dollar to George Sutherland, "and to divide the rest, residue and remainder thereof into eight hundred and eighty (880) equal shares and distribute and pay over said shares to the following persons, to wit:" Then follows the designation of persons who are to receive the same, with the number of shares each is to have. The surrogate held that the transfer of the corpus of this estate, passing by the trust deed, was taxable, because it was intended by its terms to take effect in possession and enjoyment upon her death.

The order of surrogate was affirmed.

Vide subdivision 4 of § 220. *Matter of Bostwick*, 160 N. Y. 489; *Matter of Keeney*, 194 N. Y. 281, sustained in 222 U. S. 525, sub nom. *Keeney v. New York*, and cases cited sub *Trust Deed*.

1912.

MATTER OF LUCY M. McCORMICK, 206 N. Y. 100, reverses 148 App. Div. 936, and 71 Misc. 95.

Testator died September, 1908. She left a legacy to the American Baptist Publication Society, incorporated in New York and Pennsylvania. The court say, page 104: "After the decision in *Matter of Watson* (171 N. Y. 256) was made and in 1905, § 221 of the Tax Law relating to transfer taxes was so amended as to provide that the exemption formerly existing in favor of a religious corporation should be extended to 'any religious, educational, charitable, missionary, hospital or infirmary corporation.' Thus we see that by this amendment there was embodied in the statute exempting legacies from taxation language which, so far as the point now under discussion is concerned, is just as broad as was that language of § 4 of the Tax Law * * * which it was conceded in the *Watson* case would have been comprehensive enough to exempt from taxation a bequest to the Missionary Society of the Methodist

Episcopal Church. Thus, instead of being an authority for the imposition of a transfer tax in the present case, as seemed to be the opinion of the courts below, the reasoning in the *Watson* case when applied to the form of the statutes in force when the present will took effect becomes an authority for the contrary view."

Vide first sentence of § 221.

1912.

MATTER OF JAMES JOURDAN, 206 N. Y. 653, reverses 151 App. Div. 8, and affirms 70 Misc. 159, on the dissenting opinion of Jenks, P. J., below.

The testator died a resident November 1, 1910, leaving all his property to his widow. The net estate was found by the appraiser to be \$2,146,000.48.

The statute in force at the time of decedent's death was chapter 706, Laws of 1910, in effect July 11, 1910.¹

Surrogate Ketcham fixed the tax as follows:

\$ 5,000.00.....	exempt
25,000.00 at 1%.....	\$ 250.00
100,000.00 at 2%.....	2,000.00
500,000.00 at 3%.....	15,000.00
1,000,000.00 at 4%.....	40,000.00
516,000.48 at 5%.....	25,800.02
<hr/>	<hr/>
\$2,146,000.48	\$83,050.02

The State Comptroller in his appeal contended that the tax on the transfer to the widow of the \$2,146,000.48 should have been on the following basis:

\$ 5,000.00.....	exempt
25,000.00 at 1%.....	\$ 250.00
75,000.00 at 2%.....	1,500.00
400,000.00 at 3%.....	12,000.00
500,000.00 at 4%.....	20,000.00
1,141,000.48 at 5%.....	57,050.02
<hr/>	<hr/>
\$2,146,000.48	\$90,800.02

The Court of Appeals sustained the Surrogate.

¹ Section 221 of the statute as it stood under chapter 706, Laws of 1910, provided, *inter alia*: "The rates of taxation hereinbefore prescribed in this

and the preceding section are hereby designated as 'primary rates.' Whenever any property, real or personal, or any beneficial interest therein which passes by any such transfer to or for the use of any person or corporation, shall exceed the amount of twenty-five thousand dollars over and above the exemptions hereinbefore provided the rate of taxation shall be as follows: Upon all amounts in excess of the said twenty-five thousand dollars and up to and including the sum of one hundred thousand dollars, twice the primary rates; upon all amounts in excess of the said one hundred thousand dollars and up to and including the sum of five hundred thousand dollars, three times the primary rates; upon all amounts in excess of the said five hundred thousand dollars and up to and including the sum of one million dollars, four times the primary rates; upon all amounts in excess of the said one million dollars, five times the primary rates." The statute was again amended by chapter 732, Laws of 1911, in effect July 21, 1911, by substituting the present § 221a. In *Matter of Schwarz*, 209 N. Y. mem., it was held that *Matter of Jourdan*, *supra*, was applicable to the present statute.

As to recovery of over-payment of tax, vide *Matter of Scott*, 208 N. Y. 602. For forms, vide *post*, page 881. Vide opinion of comptroller, dated January 27, 1913, 1 State Department Reports, 559, as to exemptions under Laws of 1910, chapter 706.

1912.

MATTER OF FERRUCIO A. VIVANTI, 206 N. Y. 656, affirms, without opinion, 146 App. Div. 942, which affirms, without opinion, the order of the surrogate on authority of 138 App. Div. 281, and modifies 63 Misc. 618. Same case in 200 N. Y. 513, appeal being dismissed on ground that order of surrogate was not final.

The testator died a resident March 24, 1906. The decedent was the senior partner in the firm of Vivanti Brothers, which carried on business as brokers and commission merchants in silk, with offices in Yokohama and New York. The will provided for executor's commissions to an amount exceeding the commissions prescribed by law for an executor, and a tax was imposed on the excess commissions as provided in § 226. (63 Misc. 618-621.)

He devised a portion of his real property to his widow, and a life interest in all other real property. The surrogate said (63 Misc. 618-621): "The ruling of the appraiser refusing to deduct from the appraisal the value of the widow's dower right is affirmed (*Estate of Henry I. Barbey*, N. Y. Law Journal, March 2, 1908, and cases cited)." The order of surrogate so far as it affected the question of commissions and dower was affirmed.

One of the two main questions in controversy was whether certain leasehold property in Japan was, for transfer tax purposes,

to be regarded as personal property and therefore taxable, or as real property and not taxable under doctrine of *Matter of Swift*, 137 N. Y. 77-88. The opinion of Japanese barristers, as to the nature of the estate or interest created by the instruments transferring to decedent the "leasehold" in Japan, was received in evidence before the appraiser. Translations of the instruments certified by the United States Consul-General at Yokohama to be "true and correct copies of translations of the original title deeds issued by the Japanese government," were submitted to the surrogate after the argument of the appeal and before the decision thereof.

The Appellate Division (138 App. Div. 281) say, page 281: "It would seem clear, upon all the testimony, that the premises in question were held by decedent under a perpetual lease, reserving rent, and that under the law of Japan, as well as under our own, the interest of the decedent therein was real property and not personal," and the transfer thereof not taxable.¹

The other question related to testator's interest in the good will of Vivanti Brothers. The surviving partner, who was the executor of the testator, claimed that under the co-partnership agreements he succeeded to the good-will of the business, subject to certain stipulations specified in the agreements; that the good-will of the business did not become an asset of the estate and was not subject to any tax under the Transfer Tax Law; but that if this contention was incorrect, the good-will, upon the decedent's death and the resulting destruction of the credit which his financial responsibility procured for the firm, became valueless.

The Appellate Division (138 App. Div. 281) say, page 282: "It is well settled that the good-will of a business is an asset of the estate in the hands of an executor, chargeable against him on his accounting. While its precise value may be difficult of ascertainment in any way short of actual sale, in this case the parties themselves have furnished by their agreement the rule by which that value can be determined. Under his original agreement with Tegner, the surviving partner was to pay, in case of the retirement or death of the senior partner (Vivanti) to him or to such person as he might by will or deed appoint, a sum equal to one-third of the annual profits of the business, each year for ten years, in payment for his interest in the good-will of the firm of Vivanti Brothers.

"When William Greenbaum was admitted to the firm, he bound himself to pay for the senior partner's interest in the good-will the same sum, in like annual payments, to Vivanti or in case of his death to his wife, and on her decease to a third person. After the death of Vivanti, when Greenbaum was sole surviving partner, he made a written agreement with Vivanti's widow, whereby he bound himself to pay for rights of Vivanti in the good-will of the business, instead of the one-third originally provided, twelve and one-half per cent. of the net profits for the first year, beginning July 1, 1906, and fifteen per cent. for every year thereafter until the period of ten years had expired, or until the death of the widow. It appears that the latter's expectancy of life is more than the period limited. The appraiser arrived at the value of the good-will by averaging the profits of the business for the four years preceding decedent's death, taking fifteen per cent. of that amount, and multiplying it by ten, giving a total of \$59,088.21.

"The learned Surrogate fixed the value at the amount of Vivanti's share of the profits of the business for the year immediately preceding his death. For this computation there seems to be no authority.

"The amount fixed by agreement of the parties must determine the value. But an error has been made in the computation for the percentage, for the first year should be only twelve and one-half per cent. instead of fifteen per cent., and what is to be determined is the value of the good-will as of the time of decedent's death,—that is, it would not in any event be \$59,088.21, but the present value of such a sum payable in ten annual installments.

"The order appealed from must therefore be reversed without costs, and the matter remitted to the Surrogate's Court for further action in accordance with this determination."

The appeal taken to the court of Appeals was dismissed on the ground that the order was not final within the provisions of § 190 of the Code of Civil Procedure. Thereupon the proceeding was taken up again before the appraiser, and he made a report which held that the Japanese leaseholds in perpetuity were not subject to the transfer.¹

As to the good-will the appraiser reported: "I hereby change the value of the good-will of decedent in the firm of Vivanti Bros., as fixed and determined by an order of Hon. Abner C. Thomas heretofore made herein, bearing date the 20th day of

June, 1910, from \$59,088.21, as in Appraiser Dillon's Report, to the following:

1st payment March 24th, 1907	\$ 4,689.54
2d payment March 24th, 1908	5,371.65
3d payment March 24th, 1909	5,138.10
4th payment March 24th, 1910	4,924.02
5th payment March 24th, 1911	4,727.03
6th payment March 24th, 1912	4,545.25
7th payment March 24th, 1913	4,376.90
8th payment March 24th, 1914	4,220.58
9th payment March 24th, 1915	4,075.05
10th payment March 24th, 1916	3,939.21

Total \$46,007.36

"This makes a reduction in the gross personal estate of \$13,080.85."

From such report, the surrogate, in pursuance of the provisions of § 231, made the customary order, which order was affirmed in 146 App. Div. 942, on authority of the opinion on the former appeal, 138 App. Div. 281, and the comptroller thereupon appealed to the Court of Appeals where the order was affirmed, without opinion, 206 N. Y. 656.

As to good-will vide *Matter of Jones*, 28 Misc. 356-358, affirmed, 172 N. Y. 575-587; etiam *Matter Victor*, N. Y. Law Journal, May 8, 1913, and other cases cited sub *Good Will*.

¹ As to leasehold vide *Matter of Althause*, 63 App. Div. 252, affirmed, without opinion, 168 N. Y. 670; *Matter of Rosenbaum*, N. Y. Law Journal, August 7, 1913, opinion quoted sub *Leasehold*.

1913.

MATTER OF ELIZABETH B. WHITE, 208 N. Y. 64.

Testatrix died March 2, 1908, leaving a last will and testament which, because of a contest, was not admitted to probate until over two years later. The transfer tax proceeding was commenced after the probate of the will. By one of the provisions of the will a grandson of testatrix was given a life interest in a trust fund, the remainder going to a religious corporation exempt from the tax. The grandson did not live to obtain any benefit from the life estate as he died November 8, 1908, over a year before the will was admitted to probate. The court held

that although as a practical matter he got nothing and the entire corpus of the trust went to a religious corporation exempt from the tax, still the life interest he would have been entitled to had he been fortunate enough to live until the will was admitted to probate was subject to a tax of \$1,388.09.

The court quote, page 66, that portion of § 230 which reads: "The value of every future or limited estate, income, interest or annuity dependent upon any life or lives in being, shall be determined by the rule, method and standard of mortality and value employed by the superintendent of insurance in ascertaining the value of policies of life insurance and annuities for the determination of liabilities of life insurance companies, except that the rate of interest for making such computation shall be five per centum per annum." The Appellate Division, 149 App. Div. 428-431, held that: "The purpose of the statute (section 230 of the Tax Law) was to afford a method of valuing an estate or interest not capable at the time of ascertainment with exactness because of the uncertainty attendant upon the duration of an existing life. To such a case the statute clearly applies, but where there is no such uncertainty the reason for the statute rule does not exist, and hence the statute was not intended to apply in such a case."

In reversing the order of the Appellate Division the court say, page 67: "The tax in question is imposed as provided in the statute, upon the transfer of and not upon the property. It is a tax upon the method by which the interest of the life beneficiary in the estate of the testatrix was transferred to and acquired by him. It is in the nature of an excise tax on the right to and method of transfer (Matter of Keeney, 194 N. Y. 281). The right to make a testamentary disposition of or the right to inherit property is not an inherent right; nor is it guaranteed by the fundamental law. Its exercise to any extent depends entirely upon the consent of the Legislature as expressed in their enactments. * * *

"(Page 67.) The true test by which the tax is to be measured is the value of the interest or estate transferred at the time of the transfer thereof (Matter of Sloane, 154 N. Y. 109). The interest of the life beneficiary accrued on the death of the testatrix and its value as of the time of that occurrence is the sum to which the rate per centum as fixed by the statute should be applied, and under the provision within § 222 the tax then became due and payable. Inasmuch as it became due and payable

at the time of the transfer or at the death of the testatrix, it would seem to follow, logically and necessarily, that the amount of it should be determined upon the conditions then existing. The Legislature enacted that such determination should be made through the use of the rule prescribed in and by the language of § 230, already quoted. This provision is mandatory in its language and the statute contains no other applicable or intended to apply to this case. * * *

“(Page 68.) The rule promulgated by the Legislature effects certainty and uniformity, which the principle adopted by the Appellate Division would tend to destroy.”

Vide *Matter of Jones*, 28 Misc. 356-357, affirmed, 172 N. Y. 575; *Matter of Hall*, 36 Misc. 618; *Matter of Hutchinson*, 105 App. Div. 487; *Matter of Henry K. Dyer*, N. Y. Law Journal, June 28, 1913; *Matter of Sidney*, 2 State Department Reports, 505; *Matter of Meyer*, 209 N. Y. 386-388.

In *Matter of Curtis*, 142 N. Y. 219, Mr. Justice Finch said at page 223: “It was never intended by the law to tax a theory having no real substance behind it. As was said in *Matter of Swift* (137 N. Y. 86), the question of taxation is one of fact and cannot turn on theories or fictions. This case illustrates one result of the contrary doctrine. Walter Racey, a nephew named, has died without issue. He never took anything beneficial under the will and his estate can take nothing, and yet it is assessed for about one thousand dollars, which it is said will more than exhaust all that he left, and in return for which he received actually nothing and theoretically only an unsubstantial legal fabric. That is too unjust to be borne. * * * The law itself gives abundant evidence in its language of the intent to subject only real and beneficial interests to taxation, and nothing in its policy justifies the imposition of such a burden where no corresponding benefit has been received.”

Etiam Mr. Justice Bartlett in *Matter of Roosevelt*, 143 N. Y. 120-123: “It is not to be assumed that the legislature intended to compel the citizen to pay a tax upon an interest he may never receive, and the reasonable construction of this statute leads to no such unjust result.”

1913.

MATTER OF NORMAN I. REES, 208 N. Y. 590, affirms, without opinion, 153 App. Div. 900, which affirmed, without opinion, order of surrogate.

The testator died a resident August 3, 1910. The principal item of his estate consisted of 8,933 shares of stock in Hans Rees' Sons, a New York corporation, engaged in the tanning of leather, and the controversy in this proceeding turned en-

tirely upon the value to be placed upon this stock. The total capitalization of the company was \$1,000,000, divided into 10,000 shares at \$100 each.

The business of Hans Rees' Sons was established many years ago by one Hans Rees, father of the decedent. In or about the year 1888, Hans Rees died, and the decedent, Norman I. Rees, with two of his brothers, succeeded to the business. The brothers subsequently dropped out of the business, and until 1901 Norman I. Rees conducted the business individually, and without any partners. In 1901 the business was incorporated, \$500,000 of stock being issued to pay therefor. Subsequently, the stock was increased to \$750,000, and was paid for out of the accumulated earnings of the business. A year before Mr. Rees' death, 1909, the stock was increased to \$1,000,000.

From 1885 until the date of his death, Norman I. Rees was the dominating power in creating and erecting the business, and in managing it. He made all the purchases of hides, directed the tanning operations and the selling policy of the company, and its operation was almost wholly dependent upon his personality. Until the time of his death, all commercial paper issued by the company was personally endorsed by Mr. Rees, and no money was borrowed by the company except upon his personal endorsement. None of the stock of the company was ever offered for sale on the market, and there had been no transactions of sale in the stock, with the exception that Mr. Rees had given some of his stock to relatives and old employees, and he had sold certain shares of stock to them on special terms and conditions.

The balance sheet of the company as of date of July 31, 1910, which was substantially unchanged on August 3, 1910, the date of death, showed book assets of \$1,661,677.26, with liabilities, including capital stock, of \$1,407,940.05, and an apparent surplus of \$253,737.21, representing a book value of \$125 a share. This book value was maintained by failing to make proper deductions for depreciation and over-charges on building and machinery, and was based upon a large over-valuation of the stock on hand. Making these deductions, the book value would be reduced to \$104 a share.

The four experts of the executors valued the stock from \$35 to \$70 a share. The one expert called on behalf of the comptroller valued the stock at \$90. The dividends were 17% in 1907, none in 1908, and 7% in each of the years 1909 and 1910.

The net earnings averaged 7.2% per annum for the three years 1908-1910.

The executors claimed that the tax should be based upon "market value" and not upon book value. The State Comptroller took the position that, inasmuch as there was no market for this stock and there had been no sales, the proper value of the stock for the purpose of the transfer tax was its book or intrinsic value, and not any speculative or conjectural value that so-called experts might chance to place on it. Appraiser Blau in his report said: "In the affidavit of assets submitted in the proceedings to fix the transfer tax upon this estate, the value of the stock is given at \$70 per share. Expert accountants employed both by the State Comptroller and the estate made thorough examinations of the books of the corporation, submitted statements of the value of said stock at the decedent's death and testified at length to such values. Not only are the statements so submitted and the evidence adduced conflicting, but there is a material difference of opinion as to the market value of said stock in the minds of the experts produced by the estate. The market value of said stock originally fixed by the expert accountant for the State Comptroller is \$120 per share, based upon the book value of the assets in back of such stock. It would seem from the testimony that in making said valuation no sufficient allowance was made for depreciation, etc., although consideration was given to that feature, as appears by the statement of the expert employed by the State Comptroller. The very lengthy and exhaustive testimony subsequently adduced, which shows that the depreciation referred to is more extensive than at first appeared, that the book value of the real estate constituting part of the assets had been arbitrarily increased by the officers of the company, that no maintenance account had been charged against the item of machinery, tools and fixtures, that no sufficient allowance for depreciation upon machinery, tools and fixtures at Asheville, upon the customary percentages had been made, that sums of money had been arbitrarily credited to the item of Profit and Loss and carried to the surplus of the corporation without explanation and which sums should have been properly deducted from the intrinsic value of the assets, that the cost of the finished product contained in the inventory was less by a considerable amount than appears in said inventory, together with other evidence all tending to establish a material reduction in the

assets of the corporation than originally taken into consideration by the expert employed by the State Comptroller, induced the latter to modify his valuation of this particular stock by reducing the same to \$90 per share. In this valuation the said expert has taken into consideration all elements of depreciation including the personal element of the elimination from the business of the corporation of the decedent. After due deliberation and consideration of all the testimony, including that adduced subsequent to the close of the hearings, for which latter purpose said hearings were reopened at the request of the estate's attorney, I am of the opinion that the only additional reduction in the value of this stock should be based upon the probable insufficient importance attached by the Comptroller's expert to the elimination of the decedent from the business of the corporation, a feature given prominence by Mr. Surrogate Fowler in the matter of the Estate of Sigmund J. Bach, and I therefore place the market value of said stock at \$85 per share."

The Surrogate, in affirming the report, said: "A careful examination of the testimony taken before the Appraiser and of the evidence submitted in regard to the value of decedent's holdings of stock in the Hans Rees Company leads me to believe that any errors made by the Appraiser in the admission or rejection of testimony are not prejudicial to the appellant, and that the value placed upon the stock of Hans Rees corporation by the Appraiser is reasonable and represents its fair market value at the date of decedent's death. The value of stock in a corporation, the shares of which are not customarily bought and sold in the open market, is not capable of determination with mathematical certainty; it can only be ascertained with reasonable certainty, and I am inclined to think that the Appraiser's estimate of the value of decedent's holdings in the Hans Rees Company is reasonable and is justified by the evidence taken before him."

Vide subdivision 7, § 220. Matter of Brandreth, 28 Misc. 468, affirmed, 169 N. Y. 437; Matter of Jones, 28 Misc. 356-358, affirmed, 172 N. Y. 575; Matter of Cook, 50 Misc. 487-493, affirmed, except as to rate of tax, 187 N. Y. 253-262; Matter of Smith, 71 App. Div. 602; Matter of Curtice, 111 App. Div. 230, affirmed, without opinion, 185 N. Y. 543; Matter of Chappell, 151 App. Div. 774; Matter of Bach, N. Y. Law Journal, November 21, 1911; Matter of Malcolmson, id., June 20, 1912; Matter of Valentine, id., March 13, 1913, and other cases cited sub Closely Held Stock.

1913.

MATTER OF ROBERT SCOTT, 208 N. Y. 602, affirms, without opinion, 155 App. Div. 929, which affirmed, without opinion (two Justices dissenting), order of Surrogates' Court.

Intestate died a resident July 24, 1910. Chap. 706, Laws of 1910, was the statute in force at that time. The sole next of kin and heir at law was a brother, and the entire net estate of \$129,902.41 passed to him. The appraiser's report and the order of the surrogate declared that of this amount the sum of \$500 was exempt, and taxed the transfer as follows:

\$ 500.00	exempt	
25,000.00	at 1%	\$ 250.00
75,000.00	at 2%	1,500.00
29,402.41	at 3%	882.07

Total Tax.....\$2,632.07

The order of surrogate was entered on September 21, 1911, and no appeal was taken therefrom.

The decision of the Court of Appeals in *Matter of Jourdan*, 206 N. Y. 653, was handed down the following June, and thereupon the administrators made an application to the Surrogates' Court of New York County for an order modifying the said order fixing tax, with respect to the amount of the tax assessed therein, which said application was granted and an order entered thereon in the office of the Surrogates' Court on August 9, 1912, amending the said order fixing tax by reducing the amount of transfer tax as assessed therein from \$2,632.07 to the sum of \$2,382.07.

Surrogate Cohalan said: “* * * No appeal was taken from the order fixing tax. As it is conceded that the report of the appraiser was correct, the error made in calculating the amount of tax to which the interest of William Scott was liable was a clerical error committed while performing the ministerial act of assessing the tax.

“The computation of the tax being a mathematical operation, such a mistake was necessarily a mistake of fact. The surrogate may correct such a mistake, although the time to appeal from the order has expired. (*Matter of Henderson*, 157 N. Y. 423; *Matter of Earle*, 74 App. Div. 458; *Matter of Willets*, 119 App. Div. 119; *aff'd* 190 N. Y. 527).

"As the jurisdiction of the surrogate to assess a transfer tax is derived exclusively from the Transfer Tax Law, the assessment of the tax at a rate in excess of that prescribed by statute was without jurisdiction, and the order of assessment was void to that extent. The surrogate may correct such an order, although no appeal therefrom was taken within the time prescribed by statute. (Matter of Coogan, 45 App. Div. 628; aff'd 162 N. Y. 613; Matter of Scrimgeour, 175 N. Y. 507; Matter of Silliman, 79 App. Div. 98; aff'd 175 N. Y. 513.)¹ Application to modify order fixing tax granted."

The order modifying the original order fixed the tax on the following basis:

\$ 500.00.....	exempt
25,000.00 at 1%.....	\$ 250.00
100,000.00 at 2%.....	2,000.00
4,402.41 at 3%.....	132.07
<hr/>	
Total Tax.....	\$2,382.07

Vide footnote, *supra*, page 386, Matter of Jourdan, 206 N. Y. 653.

Matter of Townsend, 153 App. Div. 85, appeal pending; Matter of Van Nest, N. Y. Law Journal, November 8, 1913, opinion quoted, *post*, page 885.

For forms on application for modification of order vide page 881.

1913.

MATTER OF MARY R. MEYER, 209 N. Y. 386.

The court say, page 387: "The estate of the testatrix consisted of personal property of an inventoried value less than the expenses of administration, namely, \$153.25, and an one-half interest in the equity of redemption in certain mortgaged real estate, which interest in the transfer tax proceeding was on December 31, 1909, appraised at about \$8,000. On July 13, 1911, the Surrogate's Court fixed the transfer tax on certain legacies at \$297.08. The real estate was sold September 25, 1912, under the judgment in the action to foreclose the mortgage upon it, for the sum due and unpaid upon the mortgage. The executor has not at any time, therefore, had any money or property with or from which he could pay any of the legacies or the transfer tax. The Tax Law (section 236) provides: 'No executor, administrator or trustee shall be entitled to a final accounting of an estate in settlement of which a tax is due under the provi-

sions of this article unless he shall produce a receipt, duly issued for the payment of the tax.

"The petition alleges as the sole ground for vacating the tax that the appraisal in the transfer tax proceeding was grossly inaccurate, that in fact there was at that time, within the statutory provisions relating to the transfer tax, no transferable property and consequently no transfer to be taxed. The petition was justly and properly denied under the principles stated in *Matter of Lowry* (89 App. Div. 226) and *Matter of White* (208 N. Y. 64), and the order appealed from should be affirmed.

"The provisions of section 236 of the Tax Law above quoted is not applicable, however, to the final accounting of the estate in question under the facts presented in the present record. The situation under our consideration is: The appraisal of the estate honestly and legally made and the nature of the bequests required that the transfer tax be fixed at \$297.08. It came to pass, within the administration of the estate, without fault or delinquency upon the part of the executor, that the estate yielded a value less than the expenses of its administration. Therefore the executor did not receive or acquire money or property usable for the payment of the transfer tax. If he is not entitled to a final accounting and discharge from his office unless he shall produce a receipt for the payment of the transfer tax, he must pay it from his individual moneys or property, although he has completely and honestly fulfilled the duties of his executorship. We think the Legislature did not intend or enact such result. * * *

"(Page 391.) A case in which, after a hearing upon proper notice to all parties interested, it is adjudged that an executor, administrator or trustee has been unable to get or collect the moneys for the payment of the tax from the transferred property through the destruction of the property or obliteration of its value during the process of administration, without fault or delinquency upon his part, is excepted from the general provision through implication.

"(Page 391.) * * * In this case, under the facts as presented, the value of the interest or property the transfer of which was taxed has vanished during the administration and the executor has been unable to get from the estate moneys for the payment of the tax. The Legislature did not impose a personal liability under such conditions."

Vide cases cited sub *Vacating Decree*, *post*, page 878.

As to lien of tax vide *Kitching v. Spear*, 26 Misc. 436; *Brown v. Lawrence Park Realty Company*, 133 App. Div. 753; *Matter of Bushnell*, 73 App. Div. 325-328, *supra*, page 275, affirmed, without opinion, 172 N. Y. 649; *Matter of Strail*, 195 N. Y. 575, *supra*, page 368; *Matter of Merritt*, 155 App. Div. 228-232.

Vide § 447 of Code of Civ. Proc. as amended by Laws of 1911, Chap. 24.

1913.

MATTER OF HERMAN SCHWARZ, 209 N. Y. mem., affirms, without opinion, 156 App. Div. 931, which affirms order of Surrogate, on the dissenting opinion of Jenks, P. J., in *Matter of Jourdan* (151 App. Div. 8, 11-14; adopted by the Court of Appeals, 206 N. Y. 653).

Testator died a resident on December 27, 1911. The transfer tax appraiser in his report found that the decedent left a net estate of \$162,998.49. Of this amount \$600 was bequeathed to his daughters and sons, and as the sum so bequeathed was less than the exemption amount provided for in subdivision 1 of § 221a, the interest so passing was declared to be exempt. The balance of the net estate, \$162,398.49, was left to the widow. The appraiser, after deducting the \$5,000 exemption provided for in said subdivision 1 of § 221a, reported as taxable \$157,398.49.

When the report of the appraiser was filed the *pro forma* order entered by the Surrogate, under the provisions of first sentence of § 231, taxed the transfer of the said \$62,398.49 to the widow as follows:

\$5,000.00	exempt
50,000.00 at 1%	\$ 500.00
107,398.49 at 2%	2,147.97
<hr/>	<hr/>
\$162,398.49	\$2,647.97

From this *pro forma* order the State Comptroller appealed to the Surrogate under the provisions of § 232. The Comptroller contended that the tax on the transfer to the widow of the \$162,398.49 should have been taxed on the following basis:

\$ 5,000.00	exempt
45,000.00 at 1%	\$ 450.00
112,398.49 at 2%	2,247.97
<hr/>	<hr/>
\$162,398.49	\$2,697.97

Surrogate Fowler on this appeal under § 232 affirmed the *pro forma* order entered by him under § 231. His opinion is reported in the New York Law Journal of September 19, 1912, and is as follows:

"The decision of the Court of Appeals in the Matter of Jourdan (206 N. Y. 653), would seem to authorize the computation of tax assessable under chapter 732 of the Laws of 1911, as follows: One per cent. on the first \$50,000 of taxable interest,¹ 2 per cent. on the next \$250,000, 3 per cent. on \$1,000,000, and 4 per cent. on any amount in excess of \$1,000,000. The decision of this court in the Matter of Lewis (Surr. Decs., 1912, p. 573), adopting a different method of computation, was made after the Appellate Division of the Second Department had reversed the order of the Surrogate in the Matter of Jourdan (70 Misc. 59), and before the Court of Appeals had reversed the order of the Appellate Division and affirmed the order of the Surrogate. While the language of § 221*a* of chapter 732 of the Laws of 1911 is not exactly similar to that employed in § 221 of chapter 706 of the Laws of 1910 (under which the decision of the Court of Appeals in the Matter of Jourdan was made), it is sufficiently so to make that decision controlling in regard to the computation of tax under the law of 1911. Besides, any doubt as to the meaning of a statute imposing a tax should be resolved in favor of the citizen."

This decision of the Surrogate was affirmed by the Appellate Division and the Court of Appeals, Justice Laughlin dissenting with an opinion, 156 App. Div. 931-932.

Vide Matter of Scott, 208 N. Y. 602 as to recovery of over-payment of tax, § 225; Matter of Hoople, 179 N. Y. 308, and cases cited sub Vacating Decree. For forms vide page 881.

¹ The case of Matter of Kip, N. Y. Law Journal, March 28, 1912, established the practice as to the exemptions under § 221*a*, the state comptroller not appealing from the decision of the surrogate overruling the appraiser. Surrogate Fowler in his opinion said: "The executors of the estate of decedent appeal from the order assessing a tax upon his estate.

"The decedent, who was a resident of New York, died on the 6th of October, 1911. He bequeathed his entire estate to his two children, and the transfer tax appraiser reported that the taxable value of the share of each legatee was the sum of \$96,490.42. The executors contend that under the provisions of chapter 732 of the Laws of 1911, \$5,000 of the amount bequeathed to each of decedent's children is exempt from taxation, and that the appraiser should have ascertained the taxable interest of each of the legatees by deducting the sum of \$5,000 from the entire amount of each legacy.

Chapter 732 of the Laws of 1911, amending the Transfer Tax Law of 1910, became a law on the 21st day of July, 1911, and as the decedent died on the 6th of October, 1911, the transfer tax upon his estate is governed by the law as amended in 1911. Sections 220 and 221a of chapter 732 of the Laws of 1911 read as follows: 'A tax shall be and is hereby imposed * * * upon a transfer taxable under this article of property * * * of an amount in excess of the value of five thousand dollars to any father, son, etc.' The word 'excess' when applied to things that are capable of mathematical definition or expression is usually understood to mean that amount by which one number or quantity exceeds another. With this understanding of the word 'excess,' the language above quoted clearly indicates that if the value of the property transferred is not in excess of \$5,000 no part of it is taxable. After thus specifying the minimum amount that must be transferred before any part of it is subject to taxation, the Legislature proceeded to prescribe the rate at which the property transferred should be taxed: 'One per centum on any amount in excess of five thousand dollars up to the sum of fifty thousand dollars.' Having provided in the first part of the paragraph for an absolute exemption from taxation if the amount transferred did not exceed \$5,000, it would not be necessary to repeat the words 'in excess of' in the clause prescribing the rate of taxation if it was not intended that this amount should be exempt from the application of such rates even when the total amount transferred was more than \$5,000. In other words, if the Legislature had intended to limit the exemption to those cases where the entire amount transferred did not exceed \$5,000, the subsequent use of the words 'in excess of' would be a needless repetition, and the words would be entirely superfluous. In order to express that meaning the clause should read: 'One per centum on any amount up to the sum of fifty thousand dollars.' But when the language of the act, construed literally and in accordance with the ordinary signification of the words employed, expresses a definite idea in conformity with the object sought to be accomplished by the Legislature, it will not, for the purpose of imputing a different intent to the Legislature or placing a different construction upon the act, be presumed that there is in the act any needless repetition of words. If all the words used express a definite meaning, it will not be presumed, for the purpose of giving the words another meaning, that any of them are superfluous.

"The Act of 1910, which is amended by the Act of 1911, provided: 'No such tax shall be imposed upon property transferred to a father, etc. * * * if the amount so transferred is the sum of five thousand dollars or less; but if the amount so transferred to a father, etc., is over five thousand dollars, the excess shall be taxable at the rate of one per centum * * * Prior to the enactment of the amendment of 1911 the Surrogates' Courts of the various counties of this State were entering orders under the Act of 1910 exempting from taxation all transfers to a father, etc., when the amount transferred did not exceed \$5,000, and were assessing a tax only upon the amount transferred in excess of \$5,000. The Legislature of 1911 must be deemed to have had knowledge of the construction which the courts had placed upon the Act of 1910, and if they had intended to change its provisions so as to limit the exemption to cases where the entire amount transferred was less than \$5,000, it is reasonable to suppose that they would

have expressed their intention in clear and unmistakable terms. The fact that the words used in regard to exemptions are practically similar to those used in the Act of 1910, indicates that the Legislature did not intend to limit the exemption of \$5,000 to those cases where the entire amount transferred to the legatee was less than \$5,000, but that they intended that it should apply to a transfer made to a father, son, etc., irrespective of the amount transferred, and that the rates of taxation prescribed by the statute should apply only to the amount transferred in excess of the sum of \$5,000. It would therefore appear that the order fixing tax should be modified by deducting the sum of \$5,000 from the amount transferred to each of decedent's children."

Vide etiam Matter of Eaton, 79 Misc. 69.

1913.

People ex rel. Lown v. Cook, 209 N. Y. mem., affirms, without opinion, 158 App. Div. 74.

The tax must be paid to the state comptroller in a county in which the office is salaried, and in other counties, to the county treasurer. Vide last sentence of § 222, *supra*, page 7, and first sentence of § 229, *supra*, page 13; etiam *post*, page 757.

If the tax is not paid to the proper official within eighteen months from the accrual thereof, interest will be charged at the rate of ten per centum per annum from the time the tax accrued (§ 223, *supra*, page 7), even though payment has been sent to the wrong official before the expiration of the eighteen months.

As to reduction of penalty, vide *post*, page 722. For form of application under § 223 for reduction of penalty vide *post*, page 723.

PRIOR STATUTES

The present statute is set forth at page 3.

In applying the principles of the decisions it frequently becomes necessary to know the exact phraseology of the statute under which the particular decision in question was rendered. The transfer tax practitioner has to consult the statute not only for this reason but also in matters involving the postponed taxation of remainders, and in transfers intended to take effect at or after death under subdivision 4 of § 220. Where the taxation of a remainder has been postponed until the death of the life tenant (Matter of Roosevelt, 143 N. Y. 120; Matter of Seaman, 147 N. Y. 69-75; Matter of Howe, 86 App. Div. 286, affirmed, without opinion, 176 N. Y. 570; Matter of Babcock, 37 Misc. 445, affirmed, without opinion, 81 App. Div. 645; Matter of Granfield, 79 Misc. 374; Matter of Ely, 157 App. Div. 658), it is necessary to refer to the statute in force at the date of the death of the testator who created the life estate. Matter of Davis, 149 N. Y. 539; Matter of Sloane, 154 N. Y. 109-113; Matter of Meyer, 83 App. Div. 381; Matter of Gibbes, 84 App. Div. 510, affirmed, without opinion, 176 N. Y. 565; Matter of Mason, 120 App. Div. 738, affirmed, without opinion, sub nom. Matter of Naylor, 189 N. Y. 556; People *ex rel.* Ripley *v.* Williams, 69 Misc. 402. Again where, within the meaning of the provisions of subdivision 4 of § 220, there has been a transfer intended to take effect in possession and enjoyment at or after the death of the transferee, the statute in force at the time such transfer was made should be consulted. Matter of Keeney, 194 N. Y. 281-287, sustained in 222 U. S. 525 sub nom. Keeney *v.* New York; Matter of Webber, 151 App. Div. 539; Matter of Dwight, N. Y. Law Journal, October 8, 1911, affirmed, without opinion, 149 App. Div. 912, opinion quoted *post*,

page 872; Matter of Atterbury, N. Y. Law Journal, March 25, 1913, opinion quoted *post*, page 871.

There have been six occasions upon which the legislature has enacted a complete statute. These six complete statutes are given exactly reproduced from the Session Laws. They are: Laws of 1885, chapter 483, in effect June 30, 1885; Laws of 1887, chapter 713, in effect June 25, 1887; Laws of 1892, chapter 399, in effect May 1, 1892; Laws of 1896, chapter 908, in effect June 15, 1896; Laws of 1905, chapter 368, in effect June 1, 1905; Laws of 1909, chapter 62, article X (Consolidated Laws, vol. V, pages 4118 to 4135) in effect February 17, 1909. The important amendments to these six acts follow the act to which the amendment refers.

Laws of 1885, Chap. 483, in effect June 30, 1885

AN ACT to tax gifts, legacies and collateral inheritances in certain cases.

PASSED June 10, 1885; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Property passing by will, etc., to other than to father, mother and others named, liable to tax of five dollars on every hundred dollars.

SECTION 1. After the passage of this act, all property which shall pass by will or by the intestate laws of this state from any person who may die seized or possessed of the same while being a resident of the state, or which property shall be within this state, or any part of such property, or any interest therein, or income therefrom, transferred by deed, grant, sale or gift made or intended to take effect in possession or enjoyment after the death of the grantor or bargainor, to any person or persons, or to a body politic or corporate, in trust or otherwise, or by reason whereof any person, or body politic or corporate shall become beneficially entitled, in possession or expectancy, to any property, or to the income thereof, other than to or for the use of father, mother, husband, wife, children, brother and sister

and lineal descendants born in lawful wedlock, and the wife or widow of a son and the husband of a daughter, and the societies, corporations and institutions now exempted by law from taxation, shall be and is subject to a tax of five dollars on every hundred dollars of the clear market value of such property, and at and after the same rate for any less amount, to be paid to the treasurer of the proper county, and in the city and county of New York to the comptroller thereof, for the use of the state, and all administrators, executors and trustees shall be liable for any and all such taxes until the same shall have been paid, as hereinafter directed; provided that an estate which may be valued at a less sum than five hundred dollars shall not be subject to said duty or tax.

§ 2. When any person shall bequeath or devise any property, or interest therein, or income therefrom, to a father, mother, husband, wife, children, brother and sister, the widow of a son, or a lineal descendant, during life or for a term of years, and the remainder to a collateral heir of the decedent, or to a stranger in blood, or to a body politic or corporate at their decease, or on the expiration of such term, the property so passing shall be appraised immediately after the death of the decedent, at what was the fair market value thereof at the time of the death of the decedent, in the manner hereinafter provided, and after deducting therefrom the value of said life estate, or term of years, the tax prescribed by this act on the remainder shall be immediately due and payable to the treasurer of the proper county, and in the city and county of New York to the comptroller thereof, and, together with the interest thereon, shall be and remain a lien on said property until the same is paid; provided that the person or persons, or body politic or corporate beneficially interested in the property chargeable with said tax may elect not to pay the same until they shall come into the actual possession or enjoyment of such property, or, and in that case, such person or persons, or body politic or cor-

Proviso as to estates of less than \$500. Property to be appraised immediately after death of decedent.

Tax immediately due and payable.

Proviso as to giving bond and postponing payment.

porate, shall give a bond to the people of the state of New York in a penalty three times the amount of the tax arising upon personal estate, with such sureties as the said surrogate may approve, conditioned for the payment of said tax and interest thereon, at such time or period as they or their representatives may come into the actual possession or enjoyment of such property, which bond shall be filed in the office of the surrogate of the proper county; provided, further, that such person shall make a full verified return of such property to said surrogate, and file the same in his office within one year from the death of the decedent and within that period enter into such security and renew the same every five years.

Ibid. as to
verified
return.

Excess
over com-
missions
or reason-
able com-
pensation
given to
executor
liable to
tax.

§ 3. Whenever a decedent appoints or names one or more executors or trustees and makes a bequest or devise of property to them in lieu of their commissions or allowances which otherwise would be liable to said tax, or appoints them his residuary legatees, and said bequest, devises or residuary legacies exceed what would be a reasonable compensation for their services, such excess shall be liable to said tax, and the surrogate's court having jurisdiction in the case shall fix such compensation.

Tax due
and pay-
able at
death of
decedent,
etc.

§ 4. All taxes imposed by this act, unless otherwise herein provided for, shall be due and payable at the death of the decedent, and if the same are paid within one year, interest at the rate of six per cent per annum shall be charged and collected thereon, but if not so paid interest at the rate of ten per cent per annum shall be charged and collected from the time said tax accrued; provided, that if said tax is paid within six months from the accruing thereof, interest shall not be charged or collected thereon, but a discount of five per cent shall be allowed and deducted from said tax, and in all cases where the executors, administrators or trustees do not pay such tax within one year from the death of the decedent, they shall be required to give a bond in the form and to the effect prescribed in

section two of this act for the payment of said tax, together with interest.

§ 5. The penalty of ten per cent per annum, imposed by section four hereof for the non-payment of said tax, shall not be charged where in cases by reason of claims made upon the estate, necessary litigation or other unavoidable cause of delay, the estate of any decedent, or a part thereof, cannot be settled at the end of a year from the death of the decedent, and in such cases only six per cent per annum shall be charged upon the said tax from the expiration of such year until the cause of such delay is removed.

Penalty for non-payment not chargeable where estate cannot be settled.

§ 6. Any administrator, executor or trustee having in charge or trust any legacy or property for distribution subject to the said tax shall deduct the tax therefrom, or if the legacy or property be not money, he shall collect the tax thereon upon the appraised value thereof from the legatee or person entitled to such property, and he shall not deliver or be compelled to deliver any specific legacy or property subject to tax to any person, until he shall have collected the tax thereon; and whenever any such legacy shall be charged upon or payable out of real estate, the heir or devisee, before paying the same, shall deduct said tax therefrom, and pay the same to the executor, administrator or trustee, and the same shall remain a charge on such real estate until paid, and the payment thereof shall be enforced by the executor, administrator or trustee in the same manner that the payment of such legacy might be enforced; if, however, such legacy be given in money to any person for a limited period, he shall retain the tax upon the whole amount, but if it be not in money, he shall make application to the court having jurisdiction of his accounts, to make an apportionment, if the case require it, of the sum to be paid into his hands by such legatees, and for such further order relative thereto as the case may require.

Administrator or executor to deduct tax.

§ 7. All executors, administrators and trustees shall have full power to sell so much of the property

Power to sell property to pay tax.

of the decedent as will enable them to pay said tax, in the same manner as they may be enabled by law to do for the payment of debts of their testators and intestates, and the amount of said tax shall be paid as hereinafter directed.

Payment
of tax to
be made
to county
treasurer,
etc.

§ 8. Every sum of money retained by any executor, administrator or trustee, or paid into his hands for any tax on any property, shall be paid by him, within thirty days thereafter, to the treasurer of the proper county, or in the city and county of New York, to the comptroller thereof, and the said treasurer or comptroller shall give, and every executor, administrator or trustee shall take, duplicate receipts from him of such payment, one of which receipts he shall immediately send to the comptroller of the state, whose duty it shall be to charge the treasurer or comptroller so receiving the tax with the amount thereof, and shall seal said receipt with the seal of his office, and countersign the same and return it to the executor, administrator or trustee, whereupon it shall be a proper voucher in the settlement of his accounts; but an executor, administrator or trustee shall not be entitled to credit in his accounts nor be discharged from liability for such tax unless he shall produce a receipt so sealed and countersigned by the comptroller, or a copy thereof certified by him.

Executors,
etc., to
give notice
to treasurer
or comp-
troller of
county.

§ 9. Whenever any of the real estate of which any decedent may die seized shall pass to any body politic or corporate, or to any person or persons, other than the father, mother, husband, wife, lawful issue, wife or widow of a son, or husband of a daughter, or in trust for them, or some of them, it shall be the duty of the executors, administrators or trustees of such decedent to give information thereof in writing to the treasurer or comptroller of the county where such real estate is situate, within six months after they undertake the execution of their respective duties, or, if the fact be not known to them within that period, then within one month after the same shall have come to their knowledge.

§ 10. Whenever any debts shall be proven against

the estate of a decedent, after the payment of legacies or distribution of property, from which the said tax has been deducted, or upon which it has been paid, and a refund is made by the legatee, devisee, heir or next of kin, a proportion of the tax so paid shall be repaid to him by the executor, administrator or trustee, if the said tax has not been paid to the county treasurer, comptroller, or to the state treasurer, or by them if it has been so paid.

When debts are proven after payment of legacies, just proportion of tax to be repaid.

§ 11. Whenever any foreign executor or administrator shall assign or transfer any stocks or loans in this state, standing in the name of a decedent, or in trust for a decedent, which shall be liable to the said tax, such tax shall be paid to the treasurer or comptroller of the proper county on the transfer thereof, otherwise the corporation permitting such transfer shall become liable to pay such tax, provided that such corporation has knowledge before such transfer that said stocks or loans are liable to said tax.

Tax to be paid on transfer of stocks by foreign executor.

§ 12. When any amount of said tax shall have been paid erroneously to the state treasurer, it shall be lawful for him, on satisfactory proof rendered to the comptroller by said county treasurer or comptroller of such erroneous payment, to refund and pay to the executor, administrator, person or persons who have paid any such tax in error, the amount of such tax so paid, provided that all such applications for the repayment of such tax shall be made within two years from the date of such payment.

Tax erroneously paid to be refunded.

§ 13. In order to fix the value of property of persons whose estates shall be subject to the payment of said tax, the surrogate, on the application of any interested party, or upon his own motion shall appoint some competent person as appraiser as often as, and whenever occasion may require, whose duty it shall be forthwith to give such notice by mail, and to such persons as the surrogate may by order direct, of the time and place he will appraise such property; and at such time and place to appraise the same at its fair market value, and make a report thereof in writing to said surrogate, together with

Surrogate to appoint appraiser; duty of appraiser; appeals from his decisions; compensation, etc.

such other facts in relation thereto as said surrogate may by order require, to be filed in the office of such surrogate; and from this report the said surrogate shall forthwith assess and fix the then cash value of all estates, annuities and life estates, or term of years growing out of said estate, and the tax to which the same is liable, and shall immediately give notice thereof by mail to all parties known to be interested therein. Any person or persons dissatisfied with said appraisement or assessment may appeal therefrom to the surrogate of the proper county within sixty days after the making and filing of such assessment, on paying, or giving security approved by the surrogate to pay all costs, together with whatever tax shall be fixed by said court. The said appraiser shall be paid by the county treasurer or comptroller out of any funds he may have in his hands on account of said tax, on the certificate of the surrogate, at the rate of three dollars per day for every day actually and necessarily employed in said appraisement, together with his actual and necessary traveling expenses.

Appraiser taking fee or reward from person liable to pay tax guilty of a misdemeanor.

§ 14. Any appraiser appointed by virtue of this act who shall take any fee or reward from any executor, administrator, trustee, legatee, next of kin or heir of any decedent, or from any other person liable to pay said tax or any portion thereof, shall be guilty of a misdemeanor, and upon conviction in any court having jurisdiction of misdemeanors he shall be fined not less than two hundred and fifty dollars nor more than five hundred dollars, and imprisoned not exceeding ninety days; and in addition thereto the surrogate shall dismiss him from such service.

Jurisdiction of surrogate's court.

§ 15. The surrogate's court in the county in which the real property is situate of a decedent who was not a resident of the state, or in the county of which the decedent was a resident at the time of his death, shall have jurisdiction to hear and determine all questions in relation to the tax arising under the provisions of this act, and the surrogate first acquiring jurisdiction hereunder shall retain the same to the exclusion of every other.

§ 16. If it shall appear to the surrogate's court that any tax accruing under this act has not been paid according to law, it shall issue a citation citing the persons interested in the property liable to the tax to appear before the court on a day certain, not more than three months after the date of such citation, and show cause why said tax should not be paid. The service of such citation and the time, manner and proof thereof and fees therefor, and the hearing and determination thereon, and the enforcement of the determination or decree shall conform to the provisions of the Code of Civil Procedure for the service of citations now issuing out of surrogates' courts, and the hearing and determination thereon and its enforcement. And the surrogate or clerk of the surrogate's court shall, upon the request of the district attorney, treasurer of the county or comptroller of the county of New York, furnish, without fee, one or more transcripts of such decree, as provided in section twenty-five hundred and fifty-three of the Code of Civil Procedure, and the same shall be docketed and filed by the county clerk of any county in the state without fee in the same manner and with the same effect as provided by said section for filing and docketing transcripts of decrees of such courts.

Citation to issue if tax has not been paid, proceedings thereon, etc.

§ 17. Whenever the treasurer or comptroller of any county shall have reason to believe that any tax is due and unpaid under this act, after the refusal or neglect of the persons interested in the property liable to said tax to pay the same, he shall notify the district attorney of the proper county, in writing, of such failure to pay such tax, and the district attorney so notified, if he have probable cause to believe a tax is due and unpaid, shall prosecute the proceeding in the surrogate's court in the proper county, as provided in section sixteen of this act, for the enforcement and collection of such tax. All costs awarded by such decree that may be collected after the collection and payment of the tax to the treasurer or comptroller of the proper county may be retained by the district at-

Treasurer or comptroller to notify district attorney of cases of refusal to pay tax, who shall prosecute for collection of same.

torney hereafter elected or appointed for his own use.

Quarter-yearly statement to be made by county clerk and surrogate.

§ 18. The surrogate and county clerk of each county shall, every three months, make a statement in writing to the county treasurer or comptroller of his county of the property from which or the party from whom he has reason to believe a tax under this act is due and unpaid.

Allowance to county treasurer or comptroller of expenses.

§ 19. Whenever the surrogate of any county shall certify that there was probable cause for issuing a citation and taking the proceedings specified in section sixteen of this act, the state treasurer shall pay or allow to the treasurer or comptroller of any county all expenses incurred for services of citation and his other lawful disbursements that have not otherwise been paid.

Book to be furnished by state comptroller and returns made by appraisers to be entered.

§ 20. The comptroller of the state shall furnish to each surrogate a book in which he shall enter the returns made by appraisers, the cash value of annuities, life estates and terms of years and other property fixed by him, and the tax assessed thereon and the amounts of any receipts for payments thereon filed with him, which books shall be kept in the office of the surrogate as a public record.

Taxes to be paid to state treasurer and report made to state comptroller.

§ 21. The treasurer of each county and the comptroller of the county of New York shall collect and pay the state treasurer all taxes that may be due and payable under this act who shall give him a receipt therefor, of which collection and payment he shall make a report under oath to the comptroller on the first Monday in March and September of each year, stating for what estate paid, and in such form and containing such particulars as the comptroller may prescribe; and for all such taxes collected by him and not paid to the state treasurer by the first day of October and April of each year, he shall pay interest at the rate of ten per cent per annum.

County treasurers and city comptroller may retain five per cent for services.

§ 22. The treasurer of each county and the comptroller of the county of New York hereafter elected or appointed shall be allowed to retain five per cent on all taxes paid and accounted for by him under this act in full for his services in collecting and pay-

ing the same, in addition to his salary or fees now allowed by law.

§ 23. Any person, or body politic or corporate, shall, upon payment of the sum of fifty cents, be entitled to a receipt from the county treasurer of any county or comptroller of the county of New York, or a copy of the receipt at his option, that may have been given by said treasurer or comptroller, for the payment of any tax under this act, to be sealed with the seal of his office, which receipt shall designate on what real property, if any, of which any decedent may have died seized, said tax has been paid, and by whom paid, and whether or not it is in full of said tax, and said receipt may be recorded in the clerk's office of the county in which said property is situate, in a book to be kept by said clerk for such purpose, which shall be labeled "Collateral tax."

Receipt to be given on payment of fifty cents fee.

To be recorded in "Collateral tax" book.

Laws of 1887, Chap. 713, in effect June 25, 1887

AN ACT to amend chapter four hundred and eighty-three of the laws of eighteen hundred and eighty-five, entitled "An act to tax gifts, legacies and collateral inheritances in certain cases."

PASSED June 25, 1887; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. Chapter four hundred and eighty-three of the laws of eighteen hundred and eighty-five, entitled "An act to tax gifts, legacies and collateral inheritances in certain cases," is hereby amended so as to read as follows:

§ 1. After the passage of this act all property which shall pass by will or by the intestate laws of this State, from any person who may die seized or possessed of the same while a resident of this State, or if such decedent was not a resident of this State

State tax upon certain property, etc., passed by will or intestate laws.

at the time of death, which property, or any part thereof, shall be within this State, or any interest therein, or income therefrom which shall be transferred by deed, grant, sale or gift, made or intended to take effect in possession or enjoyment after the death of the grantor or bargainor, to any person or persons, or to any body politic or corporate, in trust or otherwise, or by reason whereof any person or body politic or corporate shall become beneficially entitled in possession or expectancy, to any property or to the income thereof, other than to or for the use of his or her father, mother, husband, wife, child, brother, sister, the wife or widow of a son, or the husband of a daughter, or any child or children adopted as such in conformity with the laws of the State of New York, or any person to whom the deceased for not less than ten years prior to his or her death stood in the mutually acknowledged relation of a parent, and any lineal descendant of such decedent born in lawful wedlock, or the societies, corporations and institutions now exempted by law from taxation by reason whereof any such person or corporation shall become beneficially entitled, in possession or expectancy, to any such property or to the income thereof, shall be and is subject to a tax of five dollars on every hundred dollars of the clear market value of such property, and at and after the same rate for any less amount, to be paid to the treasurer of the proper county, and in the city and county of New York to the comptroller thereof, for the use of the State, and all administrators, executors and trustees shall be liable for any and all such taxes until the same shall have been paid as hereinafter directed, provided that an estate which may be valued at a less sum than five hundred dollars shall not be subject to such duty or tax.

Rate of
tax, and
to whom
payable.

Estates
under \$500
exempt.

Appraisal
of prop-
erty, after
death of
decedent,
in certain
cases.

§ 2. When any grant, gift, legacy or succession upon which a tax is imposed by section first of this act, shall be an estate, income or interest for a term of years or for life, or determinable upon any future or contingent event, or shall be a remainder, rever-

sion or other expectancy, real or personal, the entire property or fund by which such estate, income or interest is supported, or of which it is a part, shall be appraised immediately after the death of the decedent, at what was the fair and clear market value thereof at the time of the death of the decedent, in the manner hereinafter provided, and the surrogate shall thereupon assess and determine the value of the estate, income or interest subject to said tax, in the manner recorded in section thirteen of this act, and the tax prescribed by this act shall be immediately due and payable to the treasurer of the proper county, and in the city or county of New York to the comptroller thereof, and, together with the interest thereon, shall be and remain a lien on said property until the same is paid; provided that the person or persons, or body politic or corporate beneficially interested in the property chargeable with said tax, may elect not to pay the same until they shall come into the actual possession or enjoyment of such property, and in that case such person or persons or body politic or corporate, shall give a bond, to the people of the State of New York in a penalty of three times the amount of the tax arising upon personal estate, with such sureties as the surrogate of the proper county may approve conditioned for the payment of said tax and interest thereon at such time or period as they or their representatives may come into the actual possession or enjoyment of such property, which bond shall be filed in the office of the surrogate of the proper county; provided further, that such person shall make a full verified return of such property to said surrogate, and file the same in his office within one year from the death of the decedent, and within that period enter into such security and renew the same every five years.

Duty of surrogate as to valuation.

Tax to be immediately payable thereon.

Persons, etc., beneficially interested, may give bond therefor, etc.

Verified return of property to surrogate.

§ 3. Whenever a decedent appoints or names one or more executors or trustees and makes a bequest or devise of property to them in lieu of their commissions or allowances, which otherwise would be liable to said tax, or appoints them his residuary legatees, and said bequest, devises or residuary leg-

Executors or trustees, commissions of, when liable to tax.

acies exceed what would be a reasonable compensation for their services, such excess shall be liable to said tax, and the surrogate's court having jurisdiction in the case shall fix such compensation.

Taxes, when
due and
payable.

§ 4. All taxes imposed by this act unless otherwise herein provided for, shall be due and payable at the death of the decedent, and if the same are paid within eighteen months, no interest shall be charged and collected thereon, but if not so paid, interest at the rate of ten per cent. per annum shall be charged and collected from the time said tax accrued; provided, that if said tax is paid within six months from the accruing thereof, a discount of five per cent shall be allowed and deducted from said tax, and in all cases where the executors, administrators or trustees do not pay such tax within eighteen months from the death of the decedent, they shall be required to give a bond in the form and to the effect prescribed in section two of this act for the payment of said tax, together with interest.

Interest
thereon.

Penalty for
non-payment
of tax.

§ 5. The penalty of ten per cent per annum imposed by section four hereof, for the non-payment of said tax, shall not be charged where in cases by reason of claims made upon the estate, necessary litigation or other unavoidable cause of delay, the estate of any decedent, or a part thereof, cannot be settled at the end of eighteen months from the death of the decedent, and in such cases only six per cent per annum shall be charged upon the said tax, from the expiration of said eighteen months until the cause of such delay is removed.

When and
how charge-
able.

Deductions
of tax from
legacies, by
trustees, etc.

§ 6. Any administrator, executor or trustee having in charge, or trust, any legacy or property for distribution, subject to the said tax, shall deduct the tax therefrom, or if the legacy or property be not money, he shall collect the tax thereon upon the appraised value thereof from the legatee or person entitled to such property, and he shall not deliver, or be compelled to deliver, any specific legacy or property subject to tax to any person until he shall have collected the tax thereon; and whenever

any such legacy shall be charged upon or payable out of real estate, the heir or devisee before paying the same, shall deduct said tax therefrom, and pay the same to the executor, administrator or trustee, and the same shall remain a charge on such real estate until paid, and the payment thereof shall be enforced by the executor, administrator or trustee in the same manner that the payment of such legacy might be enforced; if however, such legacy be given in money to any person for a limited period, he shall retain the tax upon the whole amount, but if it be not in money, he shall make application to the court having jurisdiction of his accounts, to make an apportionment, if the case require it, of the sum to be paid into his hands by such legatees, and for such further order relative thereto as the case may require.

Payments, how made, if legacy is not in money.

Tax how enforced.

Other provisions, as to limited bequests, etc.

§ 7. All executors, administrators and trustees shall have full power to sell so much of the property of the decedent as will enable them to pay said tax, in the same manner as they may be enabled by law to do for the payment of debts of their testators and intestates, and the amount of said tax shall be paid as hereinafter directed.

Sale of property of decedent, to pay tax.

§ 8. Every sum of money retained by an executor, administrator or trustee, or paid into his hands, for any tax on any property, shall be paid by him within thirty days thereafter, to the treasurer of the proper county, or in the city and county of New York, to the comptroller thereof, and the said treasurer or comptroller shall give, and every executor, administrator or trustee shall take duplicate receipts from him of such payment, one of which receipts he shall immediately send to the Comptroller of the State, whose duty it shall be to charge the treasurer or comptroller so receiving the tax, with the amount thereof, and shall seal said receipt with the seal of his office, and countersign the same and return it to the executor, administrator or trustee, whereupon it shall be a proper voucher in the settlement of his accounts, but an executor, administrator or trustee shall be not entitled to credits in his ac-

Payments, when to be made to county treasurer, etc.

Transmission of receipt therefor, to State Comptroller.

Return of receipt, countersigned as voucher, to executor, etc.

counts, nor be discharged from liability for such tax, unless he shall produce a receipt so sealed and countersigned by the comptroller, or a copy thereof certified by him.

Executor,
etc., to no-
tify county
treasurer,
etc., as to
passing of
real estate.

§ 9. Whenever any of the real estate of which any decedent may die seized shall pass to any body politic or corporate, or to any person or persons other than his or her father, mother, husband, wife, lawful issue, brother, sister, wife or widow of a son, or husband of a daughter, or child or children adopted by such decedent according to law, or any person to whom the deceased for not less than ten years prior to his or her death, stood in the mutually acknowledged relation of a parent, or in trust for them, or some of them, it shall be the duty of the executors, administrators or trustees of such decedent, to give information thereof in writing to the treasurer or comptroller of the county where such real estate is situate, within six months after they undertake the execution of their respective duties, or if the fact be not known to them within that period, then within one month after the same shall have come to their knowledge.

Repayment
of propor-
tion of tax
paid, in
cases of
debts proven
afterward.

§ 10. Whenever any debts shall be proven against the estate of a decedent, after the payment of legacies or distribution of property from which the said tax has been deducted, or upon which it has been paid, and a refund is made by the legatee, devisee, heir or next of kin, a proportion of the tax so paid shall be repaid to him by the executor, administrator or trustee, if the said tax has not been paid to the county treasurer, comptroller, or to the State Treasurer, or by them if it has been so paid.

Tax upon
transfer of
stocks, by
foreign
executor,
etc.

§ 11. Whenever any foreign executor or administrator shall assign or transfer any stocks or loans in this State, standing in the name of a decedent, or in trust for a decedent, which shall be liable to the said tax, such tax shall be paid to the treasurer or comptroller of the proper county on the transfer thereof, otherwise the corporation permitting such transfer shall become liable to pay such tax, provided that such corporation had knowledge before such

transfer that said stocks or loans are liable to said tax.

§ 12. When any amount of said tax shall have been paid erroneously to the State Treasurer, it shall be lawful for him, on satisfactory proof rendered to the Comptroller by said county treasurer or comptroller of such erroneous payment, to refund and pay to the executor, administrator, person or persons who have paid any such tax in error, the amount of such tax so paid, provided that all such applications for the payment of such tax shall be made within five years from the date of such payment.

Tax erroneously paid, refunding of.

§ 13. In order to fix the value of property of persons whose estates shall be subject to the payment of said tax, the surrogate, on the application of any interested party, or upon his own motion, shall appoint some competent person as appraiser as often as, and whenever occasion may require, whose duty it shall be forthwith to give such notice by mail to all persons known to have or claim an interest in such property, and to such persons as the surrogate may by order direct, of the time and place he will appraise such property; and, at such time and place, to appraise the same at its fair market value, and make a report thereof in writing to said surrogate, together with such other facts in relation thereto as said surrogate may by order require, to be filed in the office of such surrogate; and from this report the said surrogate shall forthwith assess and fix the then cash value of all estates, annuities and life estates or terms of years growing out of said estate, and the tax to which the same is liable, and shall immediately give notice thereof by mail to all parties known to be interested therein, and the value of every future or contingent or limited estate, income or interest shall, for the purposes of this act, be determined by the rule, method and standards of mortality and of value, which are employed by the superintendent of the insurance department in ascertaining the value of policies of life insurance and annuities, for the determination of the liabilities of

Surrogate to appoint appraiser of certain estates.

Duty of appraiser.

To report to surrogate.

Surrogate to fix cash values of estates and tax thereon.

Rules of computation.

life insurance companies, save that the rate of interest to be assessed in computing the present value of all future interests and contingencies shall be five per cent per annum; and the superintendent of the insurance department shall, on the application of any surrogate, determine the value of such future or contingent or limited estate, income or interest, upon the facts contained in such report, and certify the same to the surrogate, and his certificate shall be conclusive evidence that the method of computations adopted therein is correct. Any person or persons dissatisfied with appraisement or assessment may appeal therefrom to the surrogate of the proper county within sixty days after the making and filing of such assessment, on paying or giving security approved by the surrogate to pay all costs, together with whatever tax shall be fixed by said court. The said appraiser shall be paid by the county treasurer or comptroller out of any funds he may have in his hands on account of said tax, on the certificate of the surrogate, at the rate of three dollars per day for every day actually and necessarily employed in said appraisement, together with his actual and necessary traveling expenses.

Appeals
from ap-
praisements.

Compensa-
tion of
appraiser.

Appraiser
accepting
bribe or
reward, how
punished.

§ 14. Any appraiser appointed by virtue of this act who shall take any fee or reward from any executor, administrator, trustee, legatee, next of kin or heir of any decedent, or from any other person liable to pay said tax, or any portion thereof, shall be guilty of a misdemeanor, and upon conviction in any court having jurisdiction of misdemeanors, he shall be fined not less than two hundred and fifty dollars nor more than five hundred dollars, and imprisoned not exceeding ninety days, and in addition thereto the surrogate shall dismiss him from such service.

Jurisdiction
of surro-
gate's court.

§ 15. The surrogate's court in the county in which the real property is situate of a decedent who was not a resident of the State, or in the county of which the decedent was a resident at the time of his death, shall have jurisdiction to hear and determine all questions in relation to the tax arising under

the provisions of this act, and the surrogate first acquiring jurisdiction hereunder shall retain the same to the exclusion of every other.

§ 16. If it shall appear to the surrogate's court that any tax accruing under this act has not been paid according to law, it shall issue a citation, citing the persons interested in the property liable to the tax to appear before the court on a day certain, not more than three months after the date of such citation, and show cause why said tax should not be paid. The service of such citation and the time, manner and proof thereof, and fees therefor, and the hearing and determination thereon, and the enforcement of the determination or decree shall conform to the provisions of the Code of Civil Procedure, for the service of citations now issuing out of surrogates' courts, and the hearing and determination thereon and its enforcement. And the surrogate, or clerk of the surrogate's court, shall, upon the request of the district-attorney, treasurer of the county, or comptroller of the county of New York, furnish, without fee, one or more transcripts of such decree as provided in section twenty-five hundred and fifty-three of the Code of Civil Procedure, and the same shall be docketed and filed by the county clerk of any county in the State without fee, in the same manner, and with the same effect as provided by said section for filing and docketing transcripts of decrees of such courts.

Citation to issue, to persons liable for tax, if remaining unpaid.

Proceedings thereupon.

Decree, how docketed and filed.

Transcripts thereof, when to be furnished.

§ 17. Whenever the treasurer or comptroller of any county shall have reason to believe that any tax is due and unpaid under this act, after the refusal or neglect of the persons interested in the property liable to said tax, to pay the same, he shall notify the district attorney of the proper county, in writing, of such failure to pay such tax, and the district attorney so notified, if he have probable cause to believe a tax is due and unpaid, shall prosecute the proceeding in the surrogate's court in the proper county, as provided in section sixteen of this act for the enforcement and collection of such tax. All costs awarded by such decree, that may be collected

County treasurer, to notify district attorney of failure to pay tax.

Duty of district attorney.

His costs.

after the collection and payment of the tax, to the treasurer or comptroller of the proper county, may be retained by the district attorney, hereafter elected or appointed, for his own use.

Quarterly
statements,
of surrogate
and county
clerk.

§ 18. The surrogate and county clerk of each county shall, every three months, make a statement in writing to the county treasurer or comptroller of his county of the property from which, or the party from which, he has reason to believe a tax under this act is due and unpaid.

Payment
of certain
expenses
of county
treasurer,
etc.

§ 19. Whenever the surrogate of any county shall certify that there was probable cause for issuing a citation and taking the proceedings specified in section seventeen of this act, the State Treasurer shall pay or allow to the treasurer or comptroller of any county all expenses incurred for services of citation and his other lawful disbursements that have not otherwise been paid.

Surrogate's
record, what
to contain.

§ 20. The Comptroller of the State shall furnish to each surrogate a book in which he shall enter the returns made by appraisers, the cash value of annuities, life estates and terms of years and other property fixed by him, and the tax assessed thereon, and the amounts of any receipts for payments thereon filed with him, which books shall be kept in the office of the surrogate as a public record.

Payments
of tax to
State
treasurer.

§ 21. The treasurer of each county and the comptroller of the county of New York shall collect and pay the State Treasurer all taxes that may be due and payable under this act, who shall give him a receipt therefor, of which collection and payment he shall make a report under oath to the Comptroller on the first Monday in March and September of each year, stating for what estate paid, and in such form and containing such particulars as the Comptroller may prescribe; and for all such taxes collected by him and not paid to the State Treasurer by the first day of October and April of each year he shall pay interest at the rate of ten per cent per annum.

Reports
thereon to
Comptroller.

Interest
upon un-
paid amounts.

§ 22. The treasurer of each county and the comptroller of the city and county of New York, shall be

allowed to retain, on all taxes paid and accounted for by him each year, under this act, in addition to his salary or fees now allowed by law, five per cent on the first fifty thousand dollars so paid and accounted for by him, three per cent on the next fifty thousand dollars so paid and accounted for by him, and one per cent on all additional sums so paid and accounted for by him.

Fees of
county
treasurers
and N. Y.
city comp-
troller.

§ 23. Any person or body politic or corporate shall, upon payment of the sum of fifty cents, be entitled to a receipt from the county treasurer of any county or comptroller of the county of New York, or a copy of the receipt, at his option, that may have been given by said treasurer or comptroller for the payment of any tax under this act, to be sealed with the seal of his office, which receipt shall designate on what real property, if any, of which any decedent may have died seized, said tax has been paid, and by whom paid, and whether or not it is in full of said tax, and said receipt may be recorded in the clerk's office of the county in which said property is situate, in a book to be kept by said clerk for such purpose, which shall be labeled "collateral tax."

Receipt
from
county
treasurer,
etc., as to
payment
of tax, how
recorded.

"Collateral
tax" record.

§ 24. All taxes levied and collected under this act, shall be paid into the treasury of the State, for the uses of the State, and shall be applicable to the payment of the general expenses of the State government and, to such other purposes as the Legislature may by law direct.

Uses of taxes
paid and
how applied.

§ 25. All acts or parts of acts inconsistent with the provisions of this act are hereby repealed.

Repeal.

§ 2. This act shall take effect immediately.

Amendment by Laws 1889, Chap. 479,

In effect June 14, 1899, amended section 25 so as to read as follows:

§ 25. All acts and parts of acts inconsistent with the provisions of this act are hereby repealed, but this act shall apply to all estates of deceased persons where no assessment of the tax has been made to which such estate or estates are liable under the provisions of the foregoing act.

Laws of 1892, Chap. 399, in effect May 1, 1892.

AN ACT in relation to taxable transfers of property.

APPROVED by the Governor April 30, 1892. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

TAXABLE TRANSFERS OF PROPERTY.**SECTION 1. Taxable transfers.**

2. Exceptions and limitations.
3. Lien of tax and payment thereof.
4. Discount, interest and penalty.
5. Collection of tax by executor, administrators and trustees.
6. Refund of tax erroneously paid.
7. Deferred payments.
8. Taxes upon devises and bequests in lieu of commissions.
9. Liability of certain corporations to tax.
10. Jurisdiction of the surrogate.
11. Appointment of appraisers.
12. Proceedings by appraisers.
13. Determination by surrogate.
14. Surrogate's assistants in New York City.
15. Proceedings for the collection of taxes.
16. Receipt from the county treasurer and comptroller.
17. Fees of county treasurer and comptroller.
18. Books and forms to be furnished by the state comptroller.
19. Reports of surrogate and county clerk.
20. Reports of county treasurers and comptrollers of the city of New York.
21. Application of taxes.
22. Definitions.
23. Laws repealed.
24. Saving clause.
25. Construction.
26. When to take effect.

§ 1. **Taxable transfers.**—A tax shall be and is hereby imposed upon the transfer of any property, real or personal, of the value of five hundred dollars or over, or of any interest therein or income therefrom, in trust or otherwise, to persons or corporations not exempt by law from taxation on real or personal property in the following cases:

1. When the transfer is by will or by the intestate laws of this state from any person dying seized or possessed of the property while a resident of the state.

2. When the transfer is by will or intestate law, of property within the state, and the decedent was a non-resident of the state at the time of his death.

3. When the transfer is of property made by a resident or by a non-resident, when such non-resident's property is within this state, by deed, grant, bargain, sale or gift made in contemplation of the death of the grantor, vendor or donor, or intended to take effect, in possession or enjoyment, at or after such death. Such tax shall also be imposed when any such person or corporation becomes beneficially entitled, in possession or expectancy, to any property or the income thereof by any such transfer, whether made before or after the passage of this act. Such tax shall be at the rate of five per cent upon the clear market value of such property, except as otherwise prescribed in the next section.

§ 2. **Exceptions and limitations.**—When the property or any beneficial interest therein passes by any such transfer to or for the use of any father, mother, husband, wife, child, brother, sister, wife or widow of a son or the husband of a daughter, or any child or children adopted as such in conformity with the laws of this state, of the decedent, grantor, donor or vendor, or to any person to whom any such decedent, grantor, donor or vendor for not less than ten years prior to such transfer stood in the mutually acknowledged relation of a parent or to any lineal descendant of such decedent, grantor, donor or vendor born in lawful wedlock, such transfer of property shall not be taxable under this act, unless it is personal property of the value of ten thousand dollars or more, in which case it shall be taxable under this act at the rate of one per centum upon the clear market value of such property. But any property heretofore or hereafter devised or bequeathed to any person who is a bishop or to any religious corporation shall be exempted from and not subject to the provisions of this act.

§ 3. Lien of tax and payment thereof.—Every such tax shall be and remain a lien upon the property transferred until paid and the person to whom the property is so transferred, and the administrators, executors and trustees of every estate so transferred shall be personally liable for such tax until its payment. The tax shall be paid to the treasurer or comptroller of the county of the surrogate having jurisdiction as herein provided; and said treasurer or comptroller shall give, and every executor, administrator or trustee shall take, duplicate receipts from him of such payment, one of which he shall immediately send to the comptroller of the state, whose duty it shall be to charge the treasurer or comptroller so receiving the tax with the amount thereof and to seal said receipt with the seal of his office and countersign the same and return it to the executor, administrator or trustee, whereupon it shall be a proper voucher in the settlement of his accounts; but no executor, administrator or trustee shall be entitled to a final accounting of an estate in settlement of which a tax is due under the provisions of this act unless he shall produce a receipt so sealed and countersigned by the comptroller or a copy thereof certified by him, or unless a bond shall have been filed as prescribed by section seven of this act. All taxes imposed by this act shall be due and payable at the time of the transfer, provided, however, that taxes upon the transfer of any estate, property or interest therein limited, conditioned, dependent or determinable upon the happening of any contingency or future event by reason of which the fair market value thereof can not be ascertained at the time of the transfer as herein provided shall accrue and become due and payable when the persons or corporations beneficially entitled thereto shall come into actual possession or enjoyment thereof.

§ 4. Discount, interest and penalty.—If such tax is paid within six months from the accruing thereof, a discount of five per centum shall be allowed and deducted therefrom. If such tax is not paid within eighteen months from the accruing thereof, interest shall be charged and collected thereon at the rate of ten per centum per annum from the time the tax accrued; unless by reason of claims made upon the estate necessary litigation or other unavoidable cause of delay, such tax can not be determined and paid as herein provided, in which case interest at the rate of six per centum per annum shall be charged upon such tax from the accrual thereof until the cause of such delay

is removed, after which ten per centum shall be charged. In all cases when a bond shall be given under the provisions of section seven of this act interest shall be charged at the rate of six per cent from the accrual of the tax until the date of payment thereof.

§ 5. Collection of tax by executors, administrators and trustees.—Every executor, administrator, or trustee shall have full power to sell so much of the property of the decedent as will enable him to pay such tax in the same manner as he might be entitled by law to do for the payment of the debts of the testator or intestate. Any such administrator, executor or trustee having in charge or in trust any legacy or property for distribution subject to such tax shall deduct the tax therefrom; and within thirty days therefrom shall pay over the same to the county treasurer or comptroller, as herein provided. If such legacy or property be not in money, he shall collect the tax thereon upon the appraised value thereof from the person entitled thereto. He shall not deliver or be compelled to deliver any specific legacy or property subject to tax under this act, to any person until he shall have collected the tax thereon. If any such legacy shall be charged upon or payable out of real property, the heir or devisee shall deduct such tax therefrom and pay it to the administrator, executor or trustee, and the tax shall remain a lien or charge on such real property until paid, and the payment thereof shall be enforced by the executor, administrator or trustee in the same manner that payment of the legacy might be enforced, or by the district attorney under section fifteen of this act. If any such legacy shall be given in money to any such person for a limited period, the administrator, executor or trustee shall retain the tax upon the whole amount, but if it be not in money, he shall make application to the court having jurisdiction of an accounting by him, to make an apportionment, if the case require it, of the sum to be paid into his hands by such legatees, and for such further order relative thereto as the case may require.

§ 6. Refund of tax erroneously paid.—If any debts shall be proven against the estate of a decedent after the payment of any legacy or distributive share thereof, from which any such tax has been deducted or upon which it has been paid by the person entitled to such legacy or distributive share and such person is required to refund the amount of such debts or any part thereof, an equitable proportion of the tax shall be repaid

to him by the executor, administrator or trustee, if the tax has not been paid to the county treasurer, comptroller of the city of New York or to the state treasurer, or by such treasurer, comptroller, or state treasurer, if such tax has been paid to him. When any amount of said tax shall have been paid erroneously into the state treasury, it shall be lawful for the comptroller of this state, upon satisfactory proof presented to him of the facts, to require the amount of such erroneous or illegal payment to be refunded to the executor, administrator, trustee, person or persons who have paid any such tax in error from the treasury; or the said comptroller may by order direct and allow the treasurer of any county or the comptroller of the city of New York to refund the amount of any illegal or erroneous payment of such tax out of the funds in his hands or custody to the credit of such taxes, and credit himself with the same in his quarterly account rendered to the comptroller of this state under this act; provided, however, that all applications for such refunding of erroneous taxes shall be made within five years from the payment thereof.

§ 7. Deferred payment.—Any person or corporation beneficially interested in any property chargeable with a tax under this act and executors, administrators and trustees thereof, may elect within one year from the date of the transfer thereof as herein provided not to pay such tax until the person or persons beneficially interested therein shall come into the actual possession or enjoyment thereof. If it be personal property, the person or persons so electing shall give a bond to the state in penalty of three times the amount of any such tax, with such sureties as the surrogate of the proper county may approve, conditioned for the payment of such tax and interest thereon, at such time or period as the person or persons beneficially interested therein may come into the actual possession or enjoyment of such property, which bond shall be filed in the office of the surrogate. Such bond must be executed and filed and a full return of such property upon oath made to the surrogate within one year from the date of transfer thereof as herein provided, and such bond must be renewed every five years.

§ 8. Taxes upon devises and bequests in lieu of commissions.—If a testator bequeaths or devises property to one or more executors or trustees in lieu of their commissions or allowances, or makes them his legatees to an amount exceeding the commissions or allowances prescribed by law for an executor

or trustee, the excess in value of the property so bequeathed or devised, above the amount of commissions or allowances prescribed by law in similar cases shall be taxable under this act.

§ 9. Liability of certain corporations to tax.—If a foreign executor, administrator or trustee shall assign or transfer any stock or obligations in this state standing in the name of a decedent, or in trust for a decedent, liable to any such tax, the tax shall be paid to the treasurer of the proper county or the comptroller of the city of New York on the transfer thereof. No safe deposit company, bank or other institution, person or persons holding securities or assets of a decedent, shall deliver or transfer the same to the executors, administrators or legal representatives of said decedent unless notice of the time and place of such intended transfer be served upon the county treasurer or comptroller at least five days prior to the said transfer. And it shall be lawful for the said county treasurer or comptroller, personally or by representative, to examine said securities or assets at the time of such delivery or transfer. Failure to serve such notice or to allow such examination shall render said safe deposit company, trust company, bank or other institution, person or persons liable to the payment of the tax due upon said securities or assets in pursuance of the provisions of this act.

§ 10. Jurisdiction of the surrogate.—The surrogate's court of every county of the state having jurisdiction to grant letters testamentary or of administration upon the estate of a decedent whose property is chargeable with any tax under this act, or to appoint a trustee of such estate or any part thereof, or to give ancillary letters thereon, shall have jurisdiction to hear and determine all questions arising under the provisions of this act, and to do any act in relation thereto authorized by law to be done by a surrogate in other matters or proceedings coming within his jurisdiction; and if two or more surrogate's courts shall be entitled to exercise any such jurisdiction, the surrogate first acquiring jurisdiction hereunder shall retain the same to the exclusion of every other surrogate. Every petition for ancillary letters testamentary or ancillary letters of administration made in pursuance of the provisions of article seven, title three, chapter eighteen of the Code of Civil Procedure shall set forth the name of the county treasurer or comptroller as a person to be cited as therein prescribed, and a true and correct statement of all the decedent's property in this state

and the value thereof; and upon the presentation thereof the surrogate shall issue a citation directed to such county treasurer or comptroller; and upon the return of the citation the surrogate shall determine the amount of the tax which may be or become due under the provisions of this act and his decree awarding the letters may contain any provision for the payment of such tax or the giving of security therefor which might be made by such surrogate if the county treasurer or comptroller were a creditor of the decedent.

§ 11. **Appointment of appraisers.**—The surrogate, upon the application of any interested party, including county treasurers, or the comptroller of New York city, or upon his own motion, shall, as often as and whenever occasion may require, appoint a competent person as appraiser, to fix the fair market value, at the time of the transfer thereof, of property of persons whose estates shall be subject to the payment of any tax imposed by this act. If the property upon the transfer of which a tax is imposed shall be an estate, income or interest for a term of years, or for life, or determinable upon any future or contingent estate, or shall be a remainder or reversion or other expectancy, real or personal, the entire property or fund by which such estate, income or interest is supported, or of which it is a part, shall be appraised immediately after such transfer, or as soon thereafter as may be practicable, at the fair and clear market value thereof at that time, provided, however, that when such estate, income or interest shall be of such a nature that its fair and clear market value can not be ascertained at such time, it shall be appraised in like manner at the time when such value first became ascertainable. The value of every future, or contingent or limited estate, income, interest or annuity dependent upon any life or lives in being shall be determined by the rule, method and standard of mortality and value employed by the superintendent of insurance in ascertaining the value of policies of life insurance and annuities for the determination of liabilities of life insurance companies; except that the rate of interest for computing the present value of all future and contingent interests or estates shall be five per centum per annum.

§ 12. **Proceedings by appraisers.**—Every such appraiser shall forthwith give notice by mail to all persons known to have a claim or interest in the property to be appraised, including the county treasurer or comptroller, and to such persons as the

surrogate may by order direct, of the time and place when he will appraise such property. He shall, at such time and place, appraise the same at its fair market value, as herein prescribed, and for that purpose the said appraiser is authorized to issue subpoenas and to compel the attendance of witnesses before him and to take the evidence of such witnesses under oath concerning such property and the value thereof; and he shall make report thereof and of such value in writing, to the said surrogate, together with the depositions of the witnesses examined, and such other facts in relation thereto and to the said matter as said surrogate may order or require. Every appraiser shall be paid on the certificate of the surrogate at the rate of three dollars per day for every day actually and necessarily employed in such appraisal, and his actual and necessary traveling expenses and the fees paid such witnesses which fees shall be the same as those now paid to witnesses subpoenaed to attend in courts of record by the county treasurer or comptroller out of any funds he may have in his hands on account of any tax imposed under the provisions of this act.

§ 13. **Determination by surrogate.**—The report of the appraiser shall be filed in the office of the surrogate, and from such report and other proof relating to any such estate before the surrogate, the surrogate shall forthwith as of course determine the cash value of all estates and the amount of tax to which the same are liable; or, the surrogate may so determine the cash value of all such estates and the amount of tax to which the same are liable without appointing an appraiser. The superintendent of insurance shall, on the application of any surrogate, determine the value of any such future or contingent estates, income or interest limited, contingent, dependent or determinable upon the life or lives of persons in being, upon the facts contained in any such appraiser's report, and certify the same to the surrogate, and his certificate shall be conclusive evidence that the method of computation adopted therein is correct. Any person dissatisfied with the appraisement or assessment and determination of tax may appeal therefrom to the surrogate within sixty days from the fixing, assessing and determination of tax by the surrogate as herein provided, upon filing in the office of the surrogate a written notice of appeal, which shall state the grounds upon which the appeal is taken. The surrogate shall immediately give notice, upon the determination by him as to the value of any estate which is

taxable under this act, and of the tax to which it is liable, to all parties known to be interested therein.

§ 14. **Surrogate's assistants in New York city.**—The comptroller of the city and county of New York shall retain out of any funds he may have in his hands on account of said tax a sum of money sufficient to provide the surrogate in the city and county of New York with an assistant, appointed by said surrogate, who shall be known as the transfer tax assistant, whose salary shall be four thousand dollars a year, a transfer tax clerk whose salary shall be two thousand four hundred dollars a year, an assistant clerk whose salary shall be one thousand eight hundred dollars a year, and a recording clerk whose salary shall be one thousand three hundred dollars a year, said salaries to be payable monthly; and a further sum of money, not exceeding five hundred dollars a year, to be used to pay the expenses of the said surrogate necessarily incurred in the assessment and collection of said tax, said amounts to be paid upon the certificates and requisitions of said surrogate respectively.

§ 15. **Proceedings for the collection of taxes.**—If the treasurer or comptroller of any county shall have reason to believe that any tax is due and unpaid under this act, after the refusal or neglect of the persons liable therefor to pay the same, he shall notify the district attorney of the county, in writing, of such failure or neglect, and such district attorney, if he have probable cause to believe that such tax is due and unpaid, shall apply to the surrogate's court for a citation, citing the persons liable to pay such tax to appear before the court on the day specified, not more than three months after the date of such citation, and show cause why the tax should not be paid. The surrogate upon such application, and whenever it shall appear to him that any such tax accruing under this act has not been paid as required by law, shall issue such citation and the service of such citation, and the time, manner and proof thereof, and the hearing and determination thereon and the enforcement of the determination or order made by the surrogate shall conform to the provisions of the Code of Civil Procedure for the service of citations out of the surrogate's court, and the hearing and determination thereon and its enforcement so far as the same may be applicable. The surrogate or his clerk shall upon request of the district attorney, treasurer or comptroller of the county, furnish without fee one or more transcripts of such

decree, which shall be docketed and filed by the county clerk of any county of the state without fee, in the same manner and with the same effect as provided by law for filing and docketing transcripts of decrees of the surrogate's court. The costs awarded by any such decree after the collection and payment of the tax to the treasurer or comptroller may be retained by the district attorney for his own use. Such costs shall be fixed by the surrogate in his discretion, but shall not exceed in any case where there has not been a contest the sum of one hundred dollars, or where there has been a contest the sum of two hundred and fifty dollars. Whenever the surrogate shall certify that there was probable cause for issuing a citation and taking the proceedings specified in this section, the state treasurer shall pay or allow to the treasurer or the comptroller of the county all expenses incurred for the service of citations and other lawful disbursements not otherwise paid. In proceedings to which any county treasurer or comptroller is cited as a party under sections eleven and twelve of this act, the state comptroller is authorized to designate and retain counsel to represent such county treasurer or comptroller therein, and to direct such county treasurer or comptroller to pay the expenses thereby incurred, out of the funds which may be in his hands on account of this tax.

§ 16. Receipt from the county treasurer and comptroller.—

Any person shall upon the payment of the sum of fifty cents be entitled to a receipt from the county treasurer of any county or the comptroller of the city of New York, or at his option to a copy of a receipt that may have been given by such treasurer or comptroller for the payment of any tax under this act, under the official seal of such treasurer or comptroller, which receipt shall designate upon what real property, if any, of which any decedent may have died seized, such tax shall have been paid, by whom paid, and whether in full of such tax. Such receipt may be recorded in the clerk's office of the county in which such property is situate, in a book to be kept by him for that purpose, which shall be labeled "transfer tax."

§ 17. Fees of county treasurer and comptroller.—The treasurer of each county and the comptroller of the city and county of New York, shall be allowed to retain on all taxes paid and accounted for by him each year, under this act, five per centum on the first fifty thousand dollars, three per centum on the next fifty thousand dollars, and one per centum on all additional

sums. Such fees shall be in addition to the salaries and fees now allowed by law to such officers.

§ 18. **Books and forms to be furnished by the state comptroller.**—The comptroller of the state shall furnish to each surrogate, a book, which shall be a public record, and in which he shall enter the name of every decedent, upon whose estate an application to him has been made for the issue of letters of administration, or letters testamentary, or ancillary letters, the date and place of death of such decedent, the estimated value of his real and personal property, the names, places, residences and relationship to him of his heirs-at-law, the names and places of residence of the legatees and devisees in any will of any such decedent, the amount of each legacy and the estimated value of any real property devised therein, and to whom devised. These entries shall be made from the data contained in the papers filed on any such application, or in any proceeding relating to the estate of the decedent. The surrogate shall also enter in such book the amount of the personal property of any such decedent, as shown by the inventory thereof when made and filed in his office, and the returns made by any appraiser appointed by him under this act, and the value of annuities, life estates, terms of years and other property of any such decedent or given by him in his will or otherwise, as fixed by the surrogate, and the tax assessed thereon, and the amounts of any receipts for payment of any tax on the estate of such decedent under this act filed with him. The state comptroller shall also furnish to each surrogate forms for the reports to be made by such surrogate, which shall correspond with the entries to be made in such book.

§ 19. **Reports of surrogate and county clerk.**—Each surrogate shall, on January, April, July and October first of each year, make a report in duplicate, upon the forms furnished by the comptroller containing all the data and matters required to be entered in such book, one of which shall be immediately delivered to the county treasurer or comptroller and the other transmitted to the state comptroller. The county clerk of each county shall at the same time make reports in duplicate, containing a statement of any deed or other conveyance filed or recorded in his office of any property, which appears to have been made or intended to take effect in possession or enjoyment after the death of the grantor or vendor, with the name and place of residence of such grantor or vendor, the name and

place of residence of the grantee or vendee, and a description of the property transferred, one of which duplicates shall be immediately delivered to the county treasurer or comptroller and the other transmitted to the state comptroller.

§ 20. **Reports of county treasurer and of the comptroller of the city of New York.**—Each county treasurer and the comptroller of the city of New York shall make a report under oath to the state comptroller, on January, April, July and October first of each year, of all taxes received by him under this act, stating for what estate and by whom and when paid. The form of such report may be prescribed by the state comptroller. He shall at the same time pay the state treasurer all taxes received by him under this act and not previously paid into the state treasury, and for all such taxes collected by him and not paid into the state treasury within thirty days from the times herein required, he shall pay interest at the rate of ten per centum per annum.

§ 21. **Application of taxes.**—All taxes levied and collected under this act shall be paid into the treasury of the state for the use of the state, and shall be applicable to the expenses of the state government and to such other purposes as the legislature shall by law direct.

§ 22. **Definitions.**—The words “estate” and “property” as used in this act shall be taken to mean the property or interest therein of the testator, intestate, grantor, bargainor or vendor, passing or transferred to those not herein specifically exempted from the provisions of this act and not as the property or interest therein passing or transferred to individual legatees, devisees, heirs, next-of-kin, grantees, donees or vendees, and shall include all property or interest therein, whether situated within or without this state, over which this state has any jurisdiction for the purposes of taxation. The word “transfer” as used in this act shall be taken to include the passing of property or any interest therein in possession or enjoyment, present or future, by inheritance, descent, devise, bequest, grant, deed, bargain, sale or gift in the manner herein prescribed. The words “county treasurer,” “comptroller” and “district attorney” as used in this act shall be taken to mean the treasurer, comptroller or district attorney of the county of the surrogate having jurisdiction as provided in section ten of this act.

§ 23. **Laws repealed.**—Of the laws enumerated in the schedule hereto annexed, that portion specified in the last column

is repealed. Such repeal shall not revive a law repealed by any law hereby repealed, but shall include all laws amendatory of the laws hereby repealed.

§ 24. **Saving clause.**—The repeal of a law or any part of it specified in the annexed schedule shall not affect or impair any act done, or right accruing, accrued or acquired, or liability, penalty, forfeiture, or punishment incurred prior to May first, eighteen hundred and ninety-two, under or by virtue of any law so repealed, but the same may be asserted, enforced, prosecuted or inflicted as fully and to the same extent as if such law had not been repealed; and all actions and proceedings, civil or criminal, commenced under or by virtue of the law so repealed and pending on April thirtieth, eighteen hundred and ninety-two, may be prosecuted and defended to final effect in the same manner as they might under the laws then existing, unless it shall be otherwise specially provided by law.

§ 25. **Construction.**—The provisions of this act, so far as they are substantially the same as those of laws existing on April thirtieth, eighteen hundred and ninety-two, shall be construed as a continuation of such laws, modified or amended according to the language employed in this act, and not as new enactments. References in laws not repealed to provisions of laws incorporated into this act and repealed, shall be construed as applying to the provisions so incorporated. Nothing in this act shall be construed to amend or repeal any provision of the Criminal or Penal Code.

§ 26. **When to take effect.**—This act shall take effect on May first, eighteen hundred and ninety-two.

SCHEDULE OF LAWS REPEALED

Laws of	Chapter	Sections
1885.	483	All.
1887.	713	All.
1889.	307	All.
1889.	479	All.
1891.	215	All.

Laws of 1896, Chap. 908, in effect June 15, 1896.**ARTICLE X.****Taxable Transfers.**

- Section 220. Taxable transfers.
- 221. Exceptions and limitations.
 - 222. Lien of tax and payment thereof.
 - 223. Discount, interest and penalty.
 - 224. Collection of tax by executors, administrators and trustees.
 - 225. Refund of tax erroneously paid.
 - 226. Deferred payments.
 - 227. Taxes upon devises and bequests in lieu of commissions.
 - 228. Liability of certain corporations to tax.
 - 229. Jurisdiction of the surrogate.
 - 230. Appointment of appraisers.
 - 231. Proceedings by appraisers.
 - 232. Determination by surrogate.
 - 233. Surrogate's assistants in New York city and Erie county.
 - 234. Surrogate's assistant in Kings county.
 - 235. Proceedings for the collection of taxes.
 - 236. Receipt from the county treasurer and comptroller.
 - 237. Fees of county treasurer and comptroller.
 - 238. Books and forms to be furnished by the state comptroller.
 - 239. Reports of surrogate and county clerk.
 - 240. Reports of county treasurers and comptrollers ¹ of the city of New York.
 - 241. Application of taxes.
 - 242. Definitions.

Section 220. **Taxable transfers.**—A tax shall be and is hereby imposed upon the transfer of any property, real or personal, of the value of five hundred dollars or over, or of any interest therein or income therefrom, in trust or otherwise, to persons

¹ So in the original.

or corporations not exempt by law from taxation on real or personal property, in the following cases:

1. When the transfer is by will or by the intestate laws of this state from any person dying seized or possessed of the property while a resident of the state.

2. When the transfer is by will or intestate law, of property within the state, and the decedent was a nonresident of the state at the time of his death.

3. When the transfer is of property made by a resident or by a nonresident, when such nonresident's property is within this state, by deed, grant, bargain, sale or gift made in contemplation of the death of the grantor, vendor or donor, or intended to take effect, in possession or enjoyment, at or after such death. Such tax shall also be imposed when any such person or corporation becomes beneficially entitled, in possession or expectancy, to any property or the income thereof by any such transfer, whether made before or after the passage of this act. Such tax shall be at the rate of five per centum upon the clear market value of such property, except as otherwise prescribed in the next section.

§ 221. **Exceptions and limitations.**—When the property or any beneficial interest therein passes by any such transfer to or for the use of any father, mother, husband, wife, child, brother, sister, wife or widow of a son or the husband of a daughter, or any child or children adopted as such in conformity with the laws of this state, of the decedent, grantor, donor or vendor or to any person to whom any such decedent, grantor, donor or vendor for not less than ten years prior to such transfer stood in the mutually acknowledged relation of a parent, or to any lineal descendent of such decedent, grantor, donor or vendor born in lawful wedlock, such transfer of property shall not be taxable under this act, unless it is personal property of the value of ten thousand dollars or more, in which case it shall be taxable under this act at the rate of one per centum upon the clear market value of such property. But any property heretofore or hereafter devised or bequeathed to any person who is a bishop or to any religious corporation shall be exempted from and not subject to the provisions of this act.

§ 222. **Lien of tax and payment thereof.**—Every such tax shall be and remain a lien upon the property transferred until paid and the person to whom the property is so transferred,

and the administrators, executors and trustees of every estate so transferred shall be personally liable for such tax until its payment. The tax shall be paid to the treasurer or comptroller of the county of the surrogate having jurisdiction as herein provided; and said treasurer or comptroller shall give, and every executor, administrator or trustee shall take duplicate receipts from him of such payment, one of which he shall immediately send to the comptroller of the state, whose duty it shall be to charge the treasurer or comptroller so receiving the tax with the amount thereof and to seal said receipt with the seal of his office and countersign the same and return it to the executor, administrator or trustee, whereupon it shall be a proper voucher in the settlement of his accounts; but no executor, administrator or trustee shall be entitled to a final accounting of an estate in settlement of which a tax is due under the provisions of this act unless he shall produce a receipt so sealed and countersigned by the comptroller or a copy thereof certified by him, or unless a bond shall have been filed as prescribed by section two hundred and twenty-six of this chapter. All taxes imposed by this article shall be due and payable at the time of the transfer; provided, however, that taxes upon the transfer of any estate, property or interest therein limited, conditioned, dependent or determinable upon the happening of any contingency or future event by reason of which the fair market value thereof can not be ascertained at the time of the transfer as herein provided shall accrue and become due and payable when the persons or corporations beneficially entitled thereto shall come into actual possession or enjoyment thereof.

§ 223. **Discount, interest and penalty.**—If such tax is paid within six months from the accruing thereof, a discount of five per centum shall be allowed and deducted therefrom. If such tax is not paid within eighteen months from the accruing thereof, interest shall be charged and collected thereon at the rate of ten per centum per annum from the time the tax accrued; unless by reasons of claims made upon the estate, necessary litigation or other unavoidable cause of delay, such tax can not be determined and paid as herein provided, in which case interest at the rate of six per centum per annum shall be charged upon such tax from the accrual thereof until the cause of such delay is removed, after which ten per centum shall be charged. In all cases when a bond shall be given under the provisions of section two hundred and twenty-six of this chapter, interest shall be

charged at the rate of six per centum from the accrual of the tax until the date of payment thereof.

§ 224. **Collection of tax by executors, administrators and trustees.**—Every executor, administrator or trustee, shall have full power to sell so much of the property of the decedent as will enable him to pay such tax in the same manner as he might be entitled by law to do for the payment of the debts of the testator or intestate. Any such administrator, executor or trustee having in charge or in trust any legacy or property for distribution subject to such tax shall deduct the tax therefrom; and within thirty days therefrom shall pay over the same to the county treasurer or comptroller, as herein provided. If such legacy or property be not in money, he shall collect the tax thereon upon the appraised value thereof from the person entitled thereto. He shall not deliver or be compelled to deliver any specific legacy or property subject to tax under this article to any person until he shall have collected the tax thereon. If any such legacy shall be charged upon or payable out of real property, the heir or devisee shall deduct such tax therefrom and pay it to the administrator, executor or trustee, and the tax shall remain a lien or charge on such real property until paid, and the payment thereof shall be enforced by the executor, administrator or trustee in the same manner that payment of the legacy might be enforced, or by the district attorney under section two hundred and thirty-five of this chapter. If any such legacy shall be given in money to any such person for a limited period, the administrator, executor or trustee shall retain the tax upon the whole amount, but if it be not in money, he shall make application to the court having jurisdiction of an accounting by him, to make an apportionment, if the case require it, of the sum to be paid into his hands by such legatees, and for such further order relative thereto as the case may require.

§ 225. **Refund of tax erroneously paid.**—If any debts shall be proven against the estate of a decedent after the payment of any legacy or distributive share thereof, from which any such tax has been deducted or upon which it has been paid by the person entitled to such legacy or distributive share and such person is required to refund the amount of such debts or any part thereof, an equitable proportion of the tax shall be repaid to him by the executor, administrator or trustee, if the tax has not been paid to the county treasurer, comptroller of

the city of New York, or to the state treasurer, or by such treasurer, comptroller or state treasurer, if such tax has been paid to him. When any amount of said tax shall have been paid erroneously into the state treasury, it shall be lawful for the comptroller of this state, upon satisfactory proof presented to him of the facts, to require the amount of such erroneous or illegal payment to be refunded to the executor, administrator, trustee, person or persons who have paid any such tax in error, from the treasury; or the said comptroller may, by order, direct and allow the treasurer of any county or the comptroller of the city of New York to refund the amount of any illegal or erroneous payment of such tax out of the funds in his hands or custody, to the credit of such taxes, and credit himself with the same in his quarterly account rendered to the comptroller of this state under this article; provided, however, that all applications for such refunding of erroneous taxes shall be made within five years from the payment thereof.

§ 226. **Deferred payment.**—Any person or corporation beneficially interested in any property chargeable with a tax under this article, and executors, administrators and trustees thereof may elect within one year from the date of the transfer thereof, as herein provided, not to pay such tax until the person or persons beneficially interested therein shall come into the actual possession or enjoyment thereof. If it be personal property, the person or persons so electing shall give a bond to the state in penalty of three times the amount of any such tax, with such sureties as the surrogate of the proper county may approve, conditioned for the payment of such tax and interest thereon, at such time or period as the person or persons beneficially interested therein may come into the actual possession or enjoyment of such property, which bond shall be filed in the office of the surrogate. Such bond must be executed and filed and a full return of such property upon oath made to the surrogate within one year from the date of transfer thereof as herein provided, and such bond must be renewed every five years.

§ 227. **Taxes upon devises and bequests in lieu of commissions.**—If a testator bequeaths or devises property to one or more executors or trustees in lieu of their commissions or allowances, or makes them his legatees to an amount exceeding the commissions or allowances prescribed by law for an executor or trustee, the excess in value of the property so bequeathed or devised, above the amount of commissions or allowances

prescribed by law in similar cases shall be taxable under this article.

§ 228. **Liability of certain corporations to tax.**—If a foreign executor, administrator or trustee shall assign or transfer any stock or obligations in this state standing in the name of a decedent, or in trust for a decedent, liable to any such tax, the tax shall be paid to the treasurer of the proper county or the comptroller of the city of New York on the transfer thereof. No safe deposit company, bank or other institution, person or persons holding securities or assets of a decedent, shall deliver or transfer the same to the executors, administrators or legal representatives of said decedent unless notice of the time and place of such intended transfer be served upon the county treasurer or comptroller at least five days prior to the said transfer. And it shall be lawful for the said county treasurer or comptroller, personally or by representative, to examine said securities or assets at the time of such delivery or transfer. Failure to serve such notice or to allow such examination shall render said safe deposit company, trust company, bank or other institution, person or persons liable to the payment of the tax due upon said securities or assets in pursuance of the provisions of this article.

§ 229. **Jurisdiction of the surrogate.**—The surrogate's court of every county of the state having jurisdiction to grant letters testamentary or of administration upon the estate of a decedent whose property is chargeable with any tax under this article, or to appoint a trustee of such estate or any part thereof, or to give ancillary letters thereon, shall have jurisdiction to hear and determine all questions arising under the provisions of this article, and to do any act in relation thereto authorized by law to be done by a surrogate in other matters or proceedings coming within his jurisdiction; and if two or more surrogates' courts shall be entitled to exercise any such jurisdiction, the surrogate first acquiring jurisdiction hereunder shall retain the same to the exclusion of every other surrogate. Every petition for ancillary letters testamentary or ancillary letters of administration made in pursuance of the provisions of article seven, title three, chapter eighteen of the code of civil procedure shall set forth the name of the county treasurer or comptroller as a person to be cited as therein prescribed, and a true and correct statement of all the decedent's property in this state and the value thereof; and upon the presentation

thereof the surrogate shall issue a citation directed to such county treasurer or comptroller; and upon the return of the citation the surrogate shall determine the amount of the tax which may be or become due under the provisions of this article and his decree awarding the letters may contain any provision for the payment of such tax or the giving of security therefor which might be made by such surrogate if the county treasurer or comptroller were a creditor of the decedent.

§ 230. **Appointment of appraisers.**—The surrogate, upon the application of any interested party, including county treasurers, or the comptroller of New York city, or upon his own motion, shall, as often as and whenever occasion may require, appoint a competent person as appraiser, to fix the fair market value, at the time of the transfer thereof of property of persons whose estates shall be subject to the payment of any tax imposed by this article. If the property upon the transfer of which a tax is imposed shall be an estate, income or interest for a term of years, or for life, or determinable upon any future or contingent estate, or shall be a remainder or reversion or other expectancy, real or personal, the entire property or fund by which such estate, income or interest is supported, or of which it is a part, shall be appraised immediately after such transfer, or as soon thereafter as may be practicable, at the fair and clear market value thereof at that time; provided, however, that when such estate, income or interest shall be of such a nature that its fair and clear market value can not be ascertained at such time, it shall be appraised in like manner at the time when such value first became ascertainable. The value of every future, or contingent or limited estate, income, interest or annuity dependent upon any life or lives in being shall be determined by the rule, method and standard of mortality and value employed by the superintendent of insurance in ascertaining the value of policies of life insurance and annuities for the determination of liabilities of life insurance companies; except that the rate of interest for computing the present value of all future and contingent interests or estates shall be five per centum per annum. Whenever an estate for life or for years can be divested by the act or omission of the legatee or devisee, it shall be taxed as if there were no possibility of such limitation.

§ 231. **Proceedings by appraisers.**—Every such appraiser shall forthwith give notice by mail to all persons known to have a claim or interest in the property to be appraised, including

the county treasurer or comptroller, and to such persons as the surrogate may by order direct, of the time and place when he will appraise such property. He shall, at such time and place, appraise the same at its fair market value, as herein prescribed, and for that purpose the said appraiser is authorized to issue subpoenas and to compel the attendance of witnesses before him and to take the evidence of such witnesses under oath concerning such property and the value thereof; and he shall make report thereof and of such value in writing, to the said surrogate, together with the depositions of the witnesses examined, and such other facts in relation thereto and to the said matter as said surrogate may order or require. Every appraiser shall be paid on the certificate of the surrogate at the rate of three dollars per day for every day actually and necessarily employed in such appraisal, and his actual and necessary traveling expenses and the fees paid such witnesses, which fees shall be the same as those now paid to witnesses subpoenaed to attend in courts of record, by the county treasurer or comptroller out of any funds he may have in his hands on account of any tax imposed under the provisions of this article.

§ 232. **Determination of surrogate.**—The report of the appraiser shall be made in duplicate, one of which duplicates shall be filed in the office of the surrogate and the other in the office of the state comptroller. From such report and other proof relating to any such estate before the surrogate, the surrogate shall forthwith, as of course determine the cash value of all estates and the amount of tax to which the same are liable; or the surrogate may so determine the cash value of all such estates and the amount of tax to which the same are liable, without appointing an appraiser. The superintendent of insurance shall, on the application of any surrogate, determine the value of any such future or contingent estates, income or interest limited, contingent, dependent or determinable upon the life or lives of persons in being, upon the facts contained in any such appraiser's report, and certify the same to the surrogate, and his certificate shall be conclusive evidence that the method of computation adopted therein is correct. The comptroller of the state of New York or any person dissatisfied with the appraisement or assessment and determination of tax, may appeal therefrom to the surrogate within sixty days from the fixing, assessing and determination of tax by the surrogate as herein provided, upon filing in the office of the surrogate a

written notice of appeal, which shall state the grounds upon which the appeal is taken. The surrogate shall immediately give notice, upon the determination by him as to the value of any estate which is taxable under this article, and of the tax to which it is liable, to all parties known to be interested therein, including the state comptroller. Within two years after the entry of an order or decree of a surrogate determining the value of an estate and assessing the tax thereon, the comptroller of the state may, if he believes that such appraisal, assessment or determination has been fraudulently, collusively, or erroneously made, make application to a justice of the supreme court of the judicial district in which the former owner of such estate resided, for a reappraisal thereof. The justice to whom such application is made may thereupon appoint a competent person to reappraise such estate. Such appraiser shall possess the powers, be subject to the duties and receive the compensation provided by sections two hundred and thirty and two hundred and thirty-one of this article. Such compensation shall be payable by the county treasurer or comptroller, out of any funds he may have on account of any tax imposed under the provisions of this article, upon the certificate of the justice appointing him. The report of such appraiser shall be filed with the justice by whom he was appointed, and thereafter the same proceedings shall be taken and had by and before such justice as are herein provided to be taken and had by and before the surrogate. The determination and assessment of such justice shall supersede the determination and assessment of the surrogate, and shall be filed by such justice in the office of the state comptroller.

§ 233. Surrogate's and district attorney's assistants in New York city and Erie county.—The comptroller of the city and county of New York shall retain, out of any funds he may have in his hands on account of said tax, a sum of money sufficient to provide the surrogates in the city and county of New York with an assistant, appointed by said surrogates, who shall be known as the transfer tax assistant, whose salary shall be four thousand dollars a year; a transfer tax clerk, whose salary shall be two thousand four hundred dollars a year; an assistant clerk, whose salary shall be one thousand eight hundred dollars a year, and a recording clerk, whose salary shall be one thousand three hundred dollars a year, said salaries to be paid monthly; and a further sum of money, not exceeding five hundred dollars

a year, to be used to pay the expenses of the said surrogates, necessarily incurred in the assessment and collection of said tax, said amounts to be paid upon the certificates and requisitions of said surrogates respectively. The comptroller of the city and county of New York shall also retain, out of any funds he may have in his hands on account of said tax, a sum of money sufficient to provide the district attorney in the city and county of New York with an assistant, appointed by said district attorney, who shall be known as the transfer tax assistant, whose salary shall be three thousand dollars a year; a transfer tax clerk whose salary shall be two thousand four hundred dollars a year, and a surrogate's process server, whose salary shall be one thousand two hundred dollars a year, said salary to be payable monthly; and a further sum of money not exceeding five hundred dollars a year, to be used to pay the expenses of the said district attorney, for the conduct and prosecution of the proceedings mentioned in section two hundred and thirty-five of this chapter, said amounts to be paid upon the certificate and requisition of said district attorney. The county treasurer of the county of Erie shall also retain out of any funds he may have in his hands on account of said tax, a sum of money sufficient to provide the district attorney in the county of Erie with an assistant, appointed by the said district attorney, who shall be known as the transfer tax assistant, whose salary shall be two thousand dollars a year, said salary to be paid monthly.

§ 234. **Surrogate's assistants in Kings county.**—The county treasurer of the county of Kings shall, from time to time, retain out of any funds which he may have in his hands, on account of taxes collected under this article, a sum of money sufficient to provide the surrogate of the county of Kings with an assistant, to be known as the transfer tax assistant and a transfer tax clerk. Such assistants shall be appointed by the surrogate, and the transfer tax assistant shall receive an annual salary of four thousand dollars, and the transfer tax clerk, an annual salary of two thousand dollars. Such salaries shall be payable monthly. Such county treasurer shall also retain, out of such funds, a further sum not exceeding five hundred dollars in any one year, for the necessary expenses of such surrogate, in the assessment and collection of such tax. Such salaries and said amount shall be paid upon the certificates and requisitions of such surrogate, respectively.

§ 235. **Proceedings for the collection of taxes.**—If the treasurer or comptroller of any county shall have reason to believe that any tax is due and unpaid under this article, after the refusal or neglect of the persons liable therefor to pay the same, he shall notify the district attorney of the county, in writing, of such failure or neglect, and such district attorney, if he have probable cause to believe that such tax is due and unpaid, shall apply to the surrogate's court for a citation, citing the persons liable to pay such tax to appear before the court on the day specified, not more than three months after the date of such citation, and show cause why the tax should not be paid. The surrogate, upon such application, and whenever it shall appear to him that any such tax accruing under this article has not been paid as required by law, shall issue such citation and the service of such citation, and the time, manner and proof thereof, and the hearing and determination thereon and the enforcement of the determination or order made by the surrogate shall conform to the provisions of the code of civil procedure for the service of citations out of the surrogate's court, and the hearing and determination thereon and its enforcement so far as the same may be applicable. The surrogate or his clerk shall, upon request of the district attorney, treasurer or comptroller of the county or the comptroller of the state, furnish, without fee, one or more transcripts of such decree, which shall be docketed and filed by the county clerk of any county of the state without fee, in the same manner and with the same effect as provided by law for filing and docketing transcripts of decrees of the surrogate's court. The costs awarded by any such decree after the collection and payment of the tax to the treasurer or comptroller may be retained by the district attorney for his own use. Such costs shall be fixed by the surrogate in his discretion, but shall not exceed in any case where there has not been a contest, the sum of one hundred dollars, or where there has been a contest the sum of two hundred and fifty dollars. Whenever the surrogate shall certify that there was probable cause for issuing a citation and taking the proceedings specified in this section, the state treasurer shall pay or allow to the treasurer or the comptroller of a county all expenses incurred for the service of citations and other lawful disbursements not otherwise paid. In proceedings to which any county treasurer or comptroller is cited as a party under sections two hundred and thirty and two hundred and thirty-one of this article, the state comptroller

is authorized to designate and retain counsel to represent such county treasurer or comptroller therein, and to direct such county treasurer or comptroller to pay the expenses thereby incurred out of the funds which may be in his hands on account of this tax. And the comptroller of the state is hereby authorized, with the approval of the attorney-general, and a justice of the supreme court of the judicial district in which the former owner resided, to compromise and settle the amount of such tax in any case where controversies have arisen or may hereafter arise as to the relationship of the beneficiaries to the former owner thereof.

§ 236. Receipt from the county treasurer and comptroller.—Any person shall upon the payment of the sum of fifty cents be entitled to a receipt from the county treasurer of any county or the comptroller of the city of New York, or at his option to a copy of a receipt that may have been given by such treasurer or comptroller for the payment of any tax under this article, under the official seal of such treasurer or comptroller, which receipt shall designate upon what real property, if any, of which any decedent may have died seized, such tax shall have been paid, by whom paid, and whether in full of such tax. Such receipt may be recorded in the clerk's office of the county in which such property is situate, in a book to be kept by him for that purpose, which shall be labeled "transfer tax."

§ 237. Fees of county treasurer and comptroller.—The treasurer of each county and the comptroller of the city and county of New York, shall be allowed to retain on all taxes paid and accounted for by him each year, under this article, five per centum on the first fifty thousand dollars, three per centum on the next fifty thousand dollars, and one per centum on all additional sums. Such fees shall be in addition to the salaries and fees now allowed by law to such officers, except that in the counties of Erie and Monroe such per centum shall be credited to and belong to the county where collected.

§ 238. Books and forms to be furnished by the state comptroller.—The comptroller of the state shall furnish to each surrogate, a book, which shall be a public record, and in which he shall enter the name of every decedent upon whose estate an application to him has been made for the issue of letters of administration, or letters testamentary, or ancillary letters, the date and place of death of such decedent, the estimated value of his real and personal property, the names, places, residence

and relationship to him of his heirs-at-law, the names and places of residence of the legatees and devisees in any will of any such decedent, the amount of each legacy and the estimated value of any real property devised therein, and to whom devised. These entries shall be made from the data contained in the papers filed on any such application, or in any proceeding relating to the estate of the decedent. The surrogate shall also enter in such book the amount of the personal property of any such decedent, as shown by the inventory thereof when made and filed in his office, and the returns made by any appraiser appointed by him under this article, and the value of annuities, life estates, terms of years, and other property of any such decedent or given by him in his will or otherwise, as fixed by the surrogate, and the tax assessed thereon, and the amounts of any receipts for payment of any tax on the estate of such decedent under this article filed with him. The state comptroller shall also furnish to each surrogate forms for the reports to be made by such surrogate, which shall correspond with the entries to be made in such book.

§ 239. **Reports of surrogate and county clerk.**—Each surrogate shall, on January, April, July and October first of each year, make a report in duplicate, upon the forms furnished by the comptroller containing all the data and matters required to be entered in such book, one of which shall be immediately delivered to the county treasurer or comptroller and the other transmitted to the state comptroller. The county clerk of each county shall, at the same times, make reports in duplicate, containing a statement of any deed or other conveyance filed or recorded in his office, of any property, which appears to have been made or intended to take effect in possession or enjoyment after the death of the grantor or vendor, with the name and place of residence of such grantor or vendor, the name and place of residence of the grantee or vendee, and a description of the property transferred, one of which duplicates shall be immediately delivered to the county treasurer or comptroller and the other transmitted to the state comptroller.

§ 240. **Reports of county treasurer and of the comptroller of the city of New York.**—Each county treasurer and the comptroller of the city of New York shall make a report, under oath, to the state comptroller, on January, April, July and October first of each year, of all taxes received by him under this article, stating for what estate and by whom and when

paid. The form of such report may be prescribed by the state comptroller. He shall, at the same time, pay the state treasurer all taxes received by him under this article and not previously paid into the state treasury, and for all such taxes collected by him and not paid into the state treasury within thirty days from the times herein required, he shall pay interest at the rate of ten per centum per annum.

§ 241. **Application of taxes.**—All taxes levied and collected under this article shall be paid into the treasury of the state for the use of the state, and shall be applicable to the expenses of the state government and to such other purposes as the legislature shall by law direct.

§ 242. **Definitions.**—The words “estate” and “property,” as used in this article, shall be taken to mean the property or interest therein of the testator, intestate, grantor, bargainor or vendor, passing or transferred to those not herein specifically exempted from the provisions of this article and not as the property or interest therein passing or transferred to individual legatees, devisees, heirs, next of kin, grantees, donees or vendees, and shall include all property or interest therein, whether situated within or without this state, over which this state has any jurisdiction for the purposes of taxation. The word “transfer,” as used in this article, shall be taken to include the passing of property or any interest therein in possession or enjoyment, present or future, by inheritance, descent, devise, bequest, grant, deed, bargain, sale or gift, in the manner herein prescribed. The words “county treasurer,” “comptroller” and “district attorney,” as used in this article shall be taken to mean the treasurer, comptroller or district attorney of the county of the surrogate having jurisdiction as provided in section two hundred and twenty-nine of this article.

Amendment by Laws of 1897, Chap. 284,

In effect April 16, 1897, amended sections **220, 222, 225, 226, 230,**
and **232,** to wit:

Section 1. The following sections of chapter nine hundred and eight of the laws of eighteen hundred and ninety-six, entitled “An act in relation to taxation, constituting chapter twenty-four of the general laws,” relating to taxable transfers of property, are hereby amended to take effect immediately, and to read as follows:

§ 220. **Taxable transfers.**—A tax shall be and is hereby imposed upon the transfer of any property, real or personal, of the value of

five hundred dollars or over, or of any interest therein or income therefrom, in trust or otherwise, to persons or corporations not exempt by law from taxation on real or personal property, in the following cases:

1. When the transfer is by will or by the intestate laws of this state from any person dying seized or possessed of the property while a resident of the state.

2. When the transfer is by will or intestate law, of property within the state, and the decedent was a nonresident of the state at the time of his death.

3. When the transfer is of property made by a resident or by a nonresident when such nonresident's property is within this state by deed, grant, bargain, sale or gift made in contemplation of the death of the grantor, vendor or donor, or intended to take effect in possession or enjoyment at or after such death.

4. (Such tax shall be imposed) When any such person or corporation becomes beneficially entitled, in possession or expectancy, to any property or the income thereof by any such transfer, whether made before or after the passage of this act.

5. Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property made either before or after the passage of this act, such appointment when made shall be deemed a transfer taxable under the provisions of this act in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will; and whenever any person or corporation possessing such a power of appointment so derived shall omit or fail to exercise the same within the time provided therefor, in whole or in part, a transfer taxable under the provisions of this act shall be deemed to take place to the extent of such omissions or failure, in the same manner as though the persons or corporations thereby becoming entitled to the possession or enjoyment of the property to which such power related had succeeded thereto by a will of the donee of the power failing to exercise such power, taking effect at the time of such omission or failure.

6. The tax imposed thereby shall be at the rate of five per centum upon the clear market value of such property, except as otherwise prescribed in the next section.

§ 222. **Lien of tax and payment thereof.**—Every such tax shall be and remain a lien upon the property transferred until paid and the person to whom the property is so transferred, and the administrators, executors and trustees of every estate so transferred shall be personally liable for such tax until its payment. The tax shall be paid to the treasurer or the comptroller of the county of the surrogate having jurisdiction as herein provided; and said treasurer or comptroller shall give, and every executor, administrator, or trustees, shall

take duplicate receipts from him of such payment, one of which he shall immediately send to the comptroller of the state, whose duty it shall be to charge the treasurer or comptroller so receiving the tax with the amount thereof and to seal said receipt with the seal of his office and countersign the same and return it to the executor, administrator or trustee, whereupon it shall be a proper voucher in the settlement of his accounts; but no executor, administrator or trustee shall be entitled to a final accounting of an estate in settlement of which a tax is due under the provisions of this act, unless he shall produce a receipt so sealed and countersigned by the state comptroller or a copy thereof certified by him, or unless a bond shall have been filed as prescribed by section two hundred and twenty-six of this chapter. All taxes imposed by this article shall be due and payable at the time of the transfer, except as hereinafter provided. Taxes upon the transfer of any estate, property or interest therein limited, conditioned, dependent or determinable upon the happening of any contingency or future event by reason of which the fair market value thereof can not be ascertained at the time of the transfer as herein provided, shall accrue and become due and payable when the persons or corporations beneficially entitled thereto shall come into actual possession or enjoyment thereof.

§ 225. Refund of tax erroneously paid.—If any debts shall be proven against the estate of a decedent after the payment of any legacy or distributive share thereof, from which any such tax has been deducted or upon which it has been paid by the person entitled to such legacy or distributive share, and such person is required by order of the surrogate having jurisdiction, on notice to the state comptroller, to refund the amount of such debts or any part thereof, an equitable proportion of the tax shall be repaid to him by the executor, administrator or trustee, if the tax has not been paid to the county treasurer, or comptroller of the city of New York, or if such tax has been paid to such treasurer or comptroller of the city of New York, he shall refund out of the funds in his hands or custody to the credit of such taxes such equitable proportion of the tax, and credit himself with the same in his quarterly account rendered to the comptroller of the state under this act. If after the payment of any tax in pursuance of an order fixing such tax, made by the surrogate having jurisdiction, such order be modified or reversed, on due notice to the comptroller of the state, the state comptroller shall, by order, direct and allow the treasurer of the county, or the comptroller of the city of New York, to refund to the executor, administrator, trustee, person or persons, by whom such tax had been paid, the amount of any moneys paid or deposited on account of such tax in excess of the amount of the tax fixed by the order modified or reversed, out of the funds in his hands or custody, to the credit of such taxes, and to credit himself with the same in his quarterly account rendered to the comptroller of the state under this

act; but no application for such refund shall be made after one year from such reversal or modification, and the comptroller of the state, shall deduct from the fees allowed by this article to the comptroller of the city of New York or the county treasurer the amount theretofore allowed him upon such overpayment. Where it shall be proved to the satisfaction of the surrogate who has assessed the tax upon the transfer of property under this article that deductions for debts were allowed upon the appraisal, since proved to have been erroneously allowed, it shall be lawful for such surrogate to enter an order assessing the tax upon the amount wrongfully or erroneously deducted.

§ 226. **Deferred payment.**—Any person or corporation beneficially interested in any property chargeable with a tax under this article, and executors, administrators and trustees thereof may elect within eighteen months from the date of the transfer thereof as herein provided, not to pay such tax until the person or persons beneficially interested therein shall come into the actual possession or enjoyment thereof. If it be personal property, the person or persons so electing shall give a bond to the state in penalty of three times the amount of any such tax, with such sureties as the surrogate of the proper county may approve, conditioned for the payment of such tax and interest thereon, at such time or period as the person or persons beneficially interested therein may come into the actual possession or enjoyment of such property, which bond shall be filed in the office of the surrogate. Such bond must be executed and filed and a full return of such property upon oath made to the surrogate within one year from the date of transfer thereof as herein provided, and such bond must be renewed every five years.

§ 230. **Appointment of appraisers.**—The surrogate, upon the application of any interested party, including the state comptroller, county treasurers, or the comptroller of New York city, or upon his own motion, shall, as often as, and whenever occasion may require, appoint a competent person as appraiser, to fix the fair market value (at the time of the transfer thereof) of property of persons whose estates shall be subject to the payment of any tax imposed by this article. If the property upon the transfer of which a tax is imposed shall be an estate, income or interest, or shall be a remainder or reversion or other expectancy, real or personal, the title to which is fixed, absolute and indefeasible, such estate or estates shall be appraised immediately after such transfer, or as soon thereafter as may be practicable, at the fair and clear market value thereof at that time; provided, however, that when such estate, income or interest shall be of such a nature that its fair and clear market value can not be ascertained at such time, it shall be appraised in like manner at the time when such value first becomes ascertainable. Estates in expectancy which are contingent or defeasible shall be appraised at their full, undiminished value when the persons entitled thereto shall come into

the beneficial enjoyment or possession thereof, without diminution for or on account of any valuation theretofore made of the particular estates for purposes of taxation, upon which said estates in expectancy may have been limited. The value of every future or limited estate, income, interest or annuity dependent upon any life or lives in being, shall be determined by the rule, method and standard of mortality and value employed by the superintendent of insurance in ascertaining the value of policies of life insurance and annuities for the determination of liabilities of life insurance companies, except that the rate of interest for making such computation shall be five per centum per annum. In estimating the value of any estate or interest in property, to the beneficial enjoyment or possession whereof there are persons or corporations presently entitled thereto, no allowance shall be made in respect of any contingent incumbrance thereon, nor in respect of any contingency upon the happening of which the estate or property or some part thereof or interest therein might be abridged, defeated or diminished; provided, however, that in the event of such incumbrance taking effect as an actual burden upon the interest of the beneficiary, or in the event of the abridgment, defeat or diminution of said estate or property or interest therein as aforesaid, a return shall be made to the person properly entitled thereto of a proportionate amount of such tax in respect of the amount or value of the incumbrance when taking effect, or so much as will reduce the same to the amount which would have been assessed in respect of the actual duration or extent of the estate or interest enjoyed. Such return of tax shall be made in the manner provided by section two hundred and twenty-five of this article. Where any property shall, after the passage of this act, be transferred subject to any charge, estate or interest, determinable by the death of any person, or at any period ascertainable only by reference to death, the increase of benefit accruing to any person or corporation upon the extinction or determination of such charge, estate or interest shall be deemed a transfer of property taxable under the provisions of this act in the same manner as though the person or corporation beneficially entitled thereto had then acquired such increase of benefit from the person from whom the title to their respective estates or interests is derived. When property is devised or bequeathed in trust for persons in succession who are all liable to taxation at the same rate, it shall be lawful for the trustees thereof to pay out of the principal of the trust fund or property the taxes to which the particular estates and the expectant estates limited thereon may be respectively liable; and when such remainders or expectant estates shall be of such a nature or so disposed and circumstanced that the taxes thereon shall not be presently payable under the provisions of this act, or when property is devised or bequeathed in trust for persons in succession who are not liable at the same rate; or where some of the persons taking in succession are exempt, it shall,

nevertheless, be lawful for county treasurers and the comptroller of New York city, by and with the consent of the comptroller of the state, expressed in writing, to agree with such trustees and to compound such taxes upon such terms as may be deemed equitable and expedient and to grant discharges to said trustees upon payment of the taxes provided for in such compositions; provided, however, that no such composition shall be conclusive in favor of such trustees as against the interest of such cestuis que trustent as may possess either present rights of enjoyment or fixed, absolute and indefeasible rights of future enjoyment, or of such as would possess such rights in the event of the immediate termination of particular estates, unless they consent thereto, either personally when competent, or by guardian or committee. Such compositions when made shall be executed in triplicate and one copy shall be filed in the office of the comptroller of the state, one copy in the office of the surrogate and one copy be delivered to the trustees who shall be parties thereto.

§ 232. **Determination of surrogate.**—The report of the appraiser shall be made in duplicate, one of which duplicates shall be filed in the office of the surrogate and the other in the office of the state comptroller. From such report and other proof relating to any such estate before the surrogate, the surrogate shall forthwith, as of course determine the cash value of all estates and the amount of tax to which the same are liable; or the surrogate may so determine the cash value of all such estates and the amount of tax to which the same are liable, without appointing an appraiser. The superintendent of insurance shall, on the application of any surrogate, determine the value of any such future or contingent estates, income or interest therein limited, contingent, dependent or determinable upon the life or lives of persons in being, upon the facts contained in any such appraiser's report, and certify the same to the surrogate, and his certificate shall be conclusive evidence that the method of computation adopted therein is correct. The comptroller of the state of New York or any person dissatisfied with the appraisement or assessment and determination of tax, may appeal, therefrom to the surrogate, within sixty days from the fixing, assessing and determination of tax by the surrogate as herein provided, upon filing in the office of the surrogate a written notice of appeal which shall state the grounds upon which the appeal is taken. The surrogate shall immediately give notice, upon the determination by him as to the value of any estate which is taxable under this article, and of the tax to which it is liable, to all parties known to be interested therein, including the state comptroller. Within two years after the entry of an order or decree of a surrogate determining the value of an estate and assessing the tax thereon, the comptroller of the state may, if he believes that such appraisal, assessment or determination has been fraudulently, collusively, or erroneously made, make application to a justice of the supreme court of the judicial dis-

trict in which the former owner of such estate resided, for a reappraisal thereof. The justice to whom such application is made may thereupon appoint a competent person to reappraise such estate. Such appraiser shall possess the powers, be subject to the duties and receive the compensation provided by sections two hundred and thirty and two hundred and thirty-one of this article. Such compensation shall be payable by the county treasurer or comptroller, out of any funds he may have on account of any tax imposed under the provisions of this article, upon the certificate of the justice appointing him. The report of such appraiser shall be filed with the justice by whom he was appointed, and thereafter the same proceedings shall be taken and had by and before such justice as herein provided to be taken and had by and before the surrogate. The determination and assessment of such justice shall supersede the determination and assessment of the surrogate, and shall be filed by such justice in the office of the state comptroller and a certified copy thereof transmitted to the surrogate's court of the proper county.

Amendment by Laws of 1899, Chap. 76,

In effect March 14, 1899, amended section 230, to wit:

Section 1. Section two hundred and thirty of chapter nine hundred and eight of the laws of eighteen hundred and ninety-six, entitled "An act in relation to taxation, constituting chapter twenty-four of the general laws," as amended by chapter two hundred and eighty-four of the laws of eighteen hundred and ninety-seven, relating to taxable transfers of property, is hereby amended to read as follows:

§ 230. **Appointment of appraisers.**—The surrogate, upon the application of any interested party, including the state comptroller, county treasurers, or the comptroller of New York city, or upon his own motion, shall, as often as, and whenever occasion may require, appoint a competent person as appraiser, to fix the fair market value (at the time of the transfer thereof) of property of persons whose estates shall be subject to the payment of any tax imposed by this article. Whenever a transfer of property is made, upon which there is, or in any contingency there may be, a tax imposed, such property shall be appraised at its clear market value immediately upon such transfer, or as soon thereafter as practicable. The value of every future or limited estate, income, interest or annuity dependent upon any life or lives in being, shall be determined by the rule, method and standard of mortality and value employed by the superintendent of insurance in ascertaining the value of policies of life insurance and annuities for the determination of liabilities of life insurance companies, except that the rate of interest for making such computation shall be five per centum per annum. In estimating the value of any estate or interest

in property, to the beneficial enjoyment or possession whereof there are persons or corporations presently entitled thereto, no allowance shall be made in respect of any contingent incumbrance thereon, nor in respect of any contingency upon the happening of which the estate or property or some part thereof or interest therein might be abridged, defeated or diminished; provided, however, that in the event of such incumbrance taking effect as an actual burden upon the interest of the beneficiary, or in the event of the abridgment, defeat or diminution of said estate or property or interest therein as aforesaid, a return shall be made to the person properly entitled thereto of a proportionate amount of such tax in respect of the amount or value of the incumbrance when taking effect, or so much as will reduce the same to the amount which would have been assessed in respect of the actual duration or extent of the estate or interest enjoyed. Such return of tax shall be made in the manner provided by section two hundred and twenty-five of this article. Where any property shall, after the passage of this act, be transferred subject to any charge, estate or interest, determinable by the death of any person, or at any period ascertainable only by reference to death, the increase of benefit accruing to any person or corporation upon the extinction or determination of such charge, estate or interest shall be deemed a transfer of property taxable under the provisions of this act in the same manner as though the person or corporation beneficially entitled thereto had then acquired such increase of benefit from the person from whom the title to their respective estates or interests is derived. When property is transferred in trust or otherwise, and the rights, interest or estates of the transferees are dependent upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended or abridged, a tax shall be imposed upon said transfer at the highest rate which, on the happening of any of the said contingencies or conditions, would be possible under the provisions of this article, and such tax so imposed shall be due and payable forthwith, out of the property transferred; provided, however, that on the happening of any contingency whereby the said property, or any part thereof, is transferred to a person or corporation exempt from taxation under the provisions of this article, or to a person taxable at a rate less than the rate imposed and paid, such person or corporation shall be entitled to a return of so much of the tax imposed and paid as is the difference between the amount paid and the amount which said person or corporation should pay under the provisions of this article, with legal interest thereon from the time of payment. Such return of overpayment shall be made in the manner provided by section two hundred and twenty-five of this article. All estates upon remainder or reversion, which vested prior to June thirtieth, eighteen hundred and eighty-five, but which will not come into actual possession or enjoyment of the person or corporation beneficially interested therein until after the passage of this act shall be ap-

praised and taxed as soon as the person or corporation beneficially interested therein shall be entitled to the actual possession or enjoyment thereof.

Amendment by Laws of 1901, Chap. 173,

In effect April 1, 1901, added two new sections, **230a** and **240a**, and amended sections **222, 225, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 239, 240, 241, 242**, to wit:

Section 1. Section two hundred and twenty-two of chapter nine hundred and eight of the laws of eighteen hundred and ninety-six, entitled "An act in relation to taxation, constituting chapter twenty-four of the general laws," as amended by chapter two hundred and eighty-four of the laws of eighteen hundred and ninety-seven, is hereby amended to read as follows:

§ 222. **Lien of taxes and payment thereof.**—Every such tax shall be and remain a lien upon the property transferred until paid and the person to whom the property is so transferred, and the administrators, executors and trustees of every estate so transferred shall be personally liable for such tax until its payment. The tax shall be paid to the treasurer in a county in which the office of appraiser is not salaried, and in other counties, to the state comptroller and said treasurer or state comptroller shall give, and every executor, administrator or trustee shall take, duplicate receipts from him of such payment. If such duplicate receipts were received from a county treasurer such executor, administrator or trustee shall immediately send one of them to the state comptroller, and if received from the state comptroller he shall immediately send one of them to the state treasurer. The state comptroller or the state treasurer, as the case may be, receiving such receipt shall charge the officer receiving the tax with the amount thereof and seal said receipt with the seal of his office and countersign the same and return it to the executor, administrator or trustee, whereupon it shall be a proper voucher in the settlement of his accounts; but no executor, administrator or trustee shall be entitled to a final accounting of an estate in settlement of which a tax is due under the provisions of this act unless he shall produce a receipt so sealed and countersigned, or a certified copy thereof, or unless a bond shall have been filed as prescribed by section two hundred and twenty-six of this chapter. All taxes imposed by this article shall be due and payable at the time of the transfer, except as hereinafter provided. Taxes upon the transfer of any estate, property or interest therein limited, conditioned, dependent or determinable upon the happening of any contingency or future event by reason of which the fair market value thereof cannot be ascertained at the time of the transfer as herein provided, shall accrue and become due and payable when the persons

or corporations beneficially entitled thereto shall come into actual possession or enjoyment thereof. All taxes which, at the time the amendment to this section takes effect, have been assessed by an order of the surrogate, or which have accrued, in a county in which the office of appraiser is salaried, shall be paid to the state comptroller, as provided by this article.

§ 2. Section two hundred and twenty-four of such chapter is hereby amended to read as follows:

§ 224. **Collection of tax by executors, administrators and trustees.**—Every executor, administrator or trustee, shall have full power to sell so much of the property of the decedent as will enable him to pay such tax in the same manner as he might be entitled by law to do for the payment of the debts of the testator or intestate. Any such administrator, executor or trustee having in charge or in trust any legacy or property for distribution subject to such tax shall deduct the tax therefrom; and within thirty days therefrom shall pay over the same to the county treasurer or state comptroller, as herein provided. If such legacy or property be not in money, he shall collect the tax thereon upon the appraised value thereof from the person entitled thereto. He shall not deliver or be compelled to deliver any specific legacy or property subject to tax under this article to any person until he shall have collected the tax thereon. If any such legacy shall be charged upon or payable out of real property, the heir or devisee shall deduct such tax therefrom and pay it to the administrator, executor or trustee, and the tax shall remain a lien or charge on such real property until paid, and the payment thereof shall be enforced by the executor, administrator or trustee in the same manner that payment of the legacy might be enforced, or by the district attorney under section two hundred and thirty-five of this chapter. If any such legacy shall be given in money to any such person for a limited period, the administrator, executor or trustee shall retain the tax upon the whole amount, but if it be not in money, he shall make application to the court having jurisdiction of an accounting by him, to make an apportionment, if the case require it, of the sum to be paid into his hands by such legatees, and for such further order relative thereto as the case may require.

§ 3. Section two hundred and twenty-five of such chapter, as amended by chapter two hundred and eighty-four of the laws of eighteen hundred and ninety-seven and chapter three hundred and eighty-two of the laws of nineteen hundred, is hereby amended to read as follows:

§ 225. **Refund of tax erroneously paid.**—If any debts shall be proven against the estate of a decedent after the payment of any legacy or distributive share thereof, from which any such tax has been deducted or upon which it has been paid by the person entitled to such legacy or distributive share, and such person is required by order of the surrogate having jurisdiction, on notice to the state comptroller, to refund

the amount of such debts or any part thereof, an equitable proportion of the tax shall be repaid to him by the executor, administrator or trustee, if the tax has not been paid to the county treasurer, or state comptroller, or if such tax has been paid to such treasurer or state comptroller, he shall refund out of the funds in his hands or custody to the credit of such taxes such equitable proportion of the tax, and credit himself with the same in the account required to be rendered by him under this article. If after the payment of any tax in pursuance of an order fixing such tax, made by the surrogate having jurisdiction, such order be modified or reversed within two years from and after the date of entry of the order fixing the tax, on due notice to the comptroller of the state, the state comptroller shall, if such tax was paid in a county in which the office of appraiser is not salaried, by order, direct and allow the treasurer of the county, to refund, or if paid in any other county, he shall himself refund to the executor, administrator, trustee, person or persons, by whom such tax has been paid, the amount of any moneys paid or deposited on account of such tax in excess of the amount of the tax fixed by the order modified or reversed, out of the funds in his hands or custody, to the credit of such taxes, and to credit himself with the same in the account required to be rendered by him under this act; but no application for such refund shall be made after one year from such reversal or modification, and the comptroller of the state shall deduct from the fees allowed by this article to the county treasurer the amount theretofore allowed him upon such overpayment. Where it shall be proved to the satisfaction of the surrogate who has assessed the tax upon the transfer of property under this article that deductions for debts were allowed upon the appraisal, since proved to have been erroneously allowed, it shall be lawful for such surrogate to enter an order assessing the tax upon the amount wrongfully or erroneously deducted.

§ 4. Sections two hundred and twenty-eight and two hundred and twenty-nine of such chapter are hereby amended to read as follows:

§ 228. **Liability of certain corporations to tax.**—If a foreign executor, administrator or trustee shall assign or transfer any stock or obligations in this state standing in the name of a decedent, or in trust for a decedent, liable to any such tax, the tax shall be paid to the treasurer of the proper county or the state comptroller on the transfer thereof. No safe deposit company, bank or other institution, person or persons holding securities or assets of a decedent, shall deliver or transfer the same to the executors, administrators or legal representatives of said decedent, or upon their order or request, unless notice of the time and place of such intended transfer be served upon the state comptroller at least ten days prior to the said transfer; nor shall any such safe deposit company, bank or other institution, person or persons deliver or transfer any securities or assets of the estate of a non-resident decedent without retaining a sufficient portion or amount

thereof to pay any tax which may thereafter be assessed on account of the transfer of such securities or assets under the provisions of this article, unless the state comptroller consents thereto in writing. And it shall be lawful for the said county treasurer or state comptroller, personally, or by representative, to examine said securities or assets at the time of such delivery or transfer. Failure to serve such notice or to allow such examination, or to retain a sufficient portion or amount to pay such tax as herein provided, shall render said safe deposit company, trust company, bank or other institution, person or persons liable to the payment of the tax due upon said securities or assets in pursuance of the provisions of this article.

§ 229. **Jurisdiction of the surrogate.**—The surrogate's court of every county of the state having jurisdiction to grant letters testamentary or of administration upon the estate of a decedent whose property is chargeable with any tax under this article, or to appoint a trustee of such estate or any part thereof, or to give ancillary letters thereon, shall have jurisdiction to hear and determine all questions arising under the provisions of this article, and to do any act in relation thereto authorized by law to be done by a surrogate in other matters or proceedings coming within his jurisdiction; and if two or more surrogates' courts shall be entitled to exercise any such jurisdiction, the surrogate first acquiring jurisdiction hereunder shall retain the same to the exclusion of every other surrogate. Every petition for ancillary letters testamentary or ancillary letters of administration made in pursuance of the provisions of article seven, title three, chapter eighteen of the code of civil procedure shall set forth the name of the county treasurer in a county in which the office of appraiser is not salaried, and in the other counties the state comptroller, as a person to be cited as therein prescribed, and a true and correct statement of all the decedent's property in this state and the value thereof; and upon the presentation thereof the surrogate shall issue a citation directed to such county treasurer or state comptroller; and upon the return of the citation the surrogate shall determine the amount of the tax which may be or become due under the provisions of this article and his decree awarding the letters may contain any provision for the payment of such tax or the giving of security therefor which might be made by such surrogate if the county treasurer or state comptroller were a creditor of the decedent.

§ 5. Section two hundred and thirty of such chapter, as amended by chapter two hundred and eighty-four, of the laws of eighteen hundred and ninety-seven; chapter seventy-six, of the laws of eighteen hundred and ninety-nine, and chapter six hundred and fifty-eight, of the laws of nineteen hundred, is hereby amended to read as follows:

§ 230. **Appointment of appraisers, stenographers, et cetera.**—The state comptroller shall appoint and may at pleasure remove, not to exceed five persons in the county of New York; two persons in the

county of Kings, and one person in the counties of Albany, Dutchess, Erie, Monroe, Oneida, Onondaga, Orange, Queens, Rensselaer, Richmond, Suffolk and Westchester, to act as appraisers therein. The appraisers so appointed shall receive an annual salary to be fixed by the state comptroller, together with their actual and necessary traveling expenses and witness fees, as hereinafter provided, payable monthly by the state comptroller out of any funds in his hands or custody on account of transfer tax. The salaries of each of the appraisers so appointed shall not exceed the following amounts: In New York county, four thousand dollars; in Kings county, three thousand dollars; in Erie county, three thousand dollars; in Westchester county eighteen hundred dollars; in Albany, Queens, Monroe and Onondaga counties one thousand five hundred dollars; in Dutchess, Oneida, Suffolk, Orange and Rensselaer counties one thousand dollars, and in Richmond county five hundred dollars. Each of the said appraisers shall file with the state comptroller his oath of office and his official bond in the penal sum of not less than one thousand nor more than twenty thousand dollars, in the discretion of the state comptroller, conditioned for the faithful performance of his duties as such appraiser, which bond shall be approved by the attorney-general and the state comptroller. The state comptroller shall retain out of any funds in his hands on account of said tax the following amounts: 1. A sum sufficient to provide the appraisers of New York county with two stenographers, and of Kings county with one stenographer, appointed by the state comptroller, whose salary shall not exceed fifteen hundred dollars a year each. 2. A sum to be used in defraying the expenses for office rent, stationery, postage, process serving, et cetera, necessarily incurred in the appraisal of estates, not exceeding three thousand dollars a year in New York county, and one thousand dollars a year in Kings county. In each county in which the office of appraiser is not salaried the county treasurer shall act as appraiser. The surrogate, either upon his own motion, or upon the application of any interested party, shall by order direct the county treasurer in a county in which the office of appraiser is not salaried, and in any other county the person or one of such persons so designated as appraisers to fix the fair market value of property of persons whose estates shall be subject to the payment of any tax imposed by this article. Whenever a transfer of property is made, upon which there is, or in any contingency there may be, a tax imposed, such property shall be appraised at its clear market value immediately upon such transfer, or as soon thereafter as practicable. The value of every future or limited estate, income, interest or annuity dependent upon any life or lives in being, shall be determined by the rule, method and standard of mortality and value employed by the superintendent of insurance in ascertaining the value of policies of life insurance and annuities for the determination of liabilities of life insurance companies, except that the rate of interest for making such

computation shall be five per centum per annum. In estimating the value of any estate or interest in property, to the beneficial enjoyment or possession whereof there are persons or corporations presently entitled thereto, no allowance shall be made in respect of any contingent incumbrance thereon, nor in respect of any contingency upon the happening of which the estate or property or some part thereof or interest therein might be abridged, defeated or diminished; provided, however, that in the event of such incumbrance taking effect as an actual burden upon the interest of the beneficiary, or in the event of the abridgment, defeat or diminution of said estate or property or interest therein as aforesaid, a return shall be made to the person properly entitled thereto of a proportionate amount of such tax in respect of the amount or value of the incumbrance when taking effect, or so much as will reduce the same to the amount which would have been assessed in respect of the actual duration or extent of the estate or interest enjoyed. Such return of tax shall be made in the manner provided by section two hundred and twenty-five of this article. Where any property shall, after the passage of this act, be transferred subject to any charge, estate or interest, determinable by the death of any person, or at any period ascertainable only by reference to death, the increase of benefit accruing to any person or corporation upon the extinction or determination of such charge, estate or interest shall be deemed a transfer of property taxable under the provisions of this act in the same manner as though the person or corporation beneficially entitled thereto had then acquired such increase or benefit from the person from whom the title to their respective estates or interests is derived. When property is transferred in trust or otherwise, and the rights, interest or estates of the transferees are dependent upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended or abridged, a tax shall be imposed upon said transfer at the highest rate which, on the happening of any of the said contingencies or conditions, would be possible under the provisions of this article, and such tax so imposed shall be due and payable forthwith by the executors or trustees out of the property transferred; provided, however, that on the happening of any contingency whereby the said property, or any part thereof, is transferred to a person or corporation exempt from taxation under the provisions of this article, or to any person taxable at a rate less than the rate imposed and paid, such person or corporation shall be entitled to a return of so much of the tax imposed and paid as is the difference between the amount paid and the amount which said person or corporation should pay under the provisions of this article, with legal interest thereon from the time of payment. Such return of overpayment shall be made in the manner provided by section two hundred and twenty-five of this article. Estates in expectancy which are contingent or defeasible and in which proceedings for the determination of the tax have not been taken or

where the taxation thereof has been held in abeyance, shall be appraised at their full, undiminished value when the persons entitled thereto shall come into the beneficial enjoyment or possession thereof, without diminution for or on account of any valuation theretofore made of the particular estates for purposes of taxation, upon which said estates in expectancy may have been limited. Where an estate for life or for years can be divested by the act or omission of the legatee or devisee it shall be taxed as if there were no possibility of such divesting. All estates upon remainder or reversion, which vested prior to May first eighteen hundred and ninety-two, but which will not come into actual possession or enjoyment of the person or corporation beneficially interested therein until after the passage of this act shall be appraised and taxed as soon as the person or corporation beneficially interested therein shall be entitled to the actual possession or enjoyment thereof.

§ 6. Such chapter is hereby amended by inserting therein a new section to be known as section two hundred and thirty-a, and to read as follows:

§ 230a. **Composition of transfer tax upon certain estates.**—The county treasurer of any county in which the office of appraiser is not salaried, by and with the consent of the comptroller of the state of New York, expressed in writing, and the state comptroller in any other county, by and with the consent of the attorney-general expressed in writing, is hereby empowered and authorized in a county in which they receive payments on account of transfer tax, to enter into an agreement with the trustees of any estate therein situate, in which remainders or expectant estates have been of such a nature, or so disposed and circumstanced, that the taxes therein were held not presently payable, or where the interests of the legatees or devisees were not ascertainable under the provisions of chapter four hundred and eighty-three of the laws of eighteen hundred and eighty-five; chapter three hundred and ninety-nine of the laws of eighteen hundred and ninety-two, or chapter nine hundred and eight of the laws of eighteen hundred and ninety-six, and the several acts amendatory thereof and supplemental thereto; and to compound such taxes upon such terms as may be deemed equitable and expedient; and to grant discharge to said trustees upon the payment of the taxes provided for in such composition; provided, however, that no such composition shall be conclusive in favor of said trustees as against the interests of such cestuis que trust, as may possess either present rights of enjoyment, or fixed, absolute or indefeasible rights of future enjoyment, or of such as would possess such rights in the event of the immediate termination of particular estates, unless they consent thereto, either personally, when competent, or by guardian or committee. Composition or settlement made or effected under the provisions of this section shall be executed in triplicate, and one copy shall be filed in the office of the state comp-

troller, one copy in the office of the surrogate of the county in which the tax was paid, and one copy to be delivered to the executors, administrators or trustees who shall be parties thereto.

§ 7. Section two hundred and thirty-one of such chapter, as amended by chapter six hundred and fifty-eight of the laws of nineteen hundred, is hereby amended to read as follows:

§ 231. **Proceedings by appraiser.**—Every such appraiser shall forthwith give notice by mail to all persons known to have a claim or interest in the property to be appraised, including the state comptroller, and to such persons as the surrogate may by order direct, of the time and place when he will appraise such property. He shall, at such time and place, appraise the same at its fair market value as herein prescribed, and for that purpose the said appraiser is authorized to issue subpoenas and to compel the attendance of witnesses before him and to take the evidence of such witnesses under oath concerning such property and the value thereof; and he shall make report thereof and of such value in writing, to the said surrogate, together with the depositions of the witnesses examined, and such other facts in relation thereto and to said matter as the surrogate may order or require. Every appraiser, except in the counties in which the office of appraiser is salaried, for which provision is hereinbefore made, shall be paid on the certificate of the surrogate, subject to review and audit by the state comptroller, his actual and necessary traveling expenses and the fees paid such witnesses, which fees shall be the same as those now paid to witnesses subpoenaed to attend in courts of record, out of any funds he may have in his hands as county treasurer on account of any tax imposed under the provisions of this article. Appraisers appointed under this article in proceedings pending at the time the amendment to this section takes effect shall complete the appraisals therein and file their reports as herein provided, and shall be entitled to the compensation authorized by law at the time of their appointment, to be paid by the state comptroller in counties in which the office of appraiser is salaried, and in other counties by the county treasurer, out of any moneys in his hands on account of this tax.

§ 8. Section two hundred and thirty-two of such chapter, as amended by chapter two hundred and eighty-four of the laws of eighteen hundred and ninety-seven, and chapter six hundred and seventy-two of the laws of eighteen hundred and ninety-nine, is hereby amended to read as follows:

§ 232. **Determination of surrogate.**—The report of the appraiser shall be made in duplicate, one of which duplicates shall be filed in the office of the surrogate and the other in the office of the state comptroller. From such report and other proof relating to any such estate before the surrogate, the surrogate shall forthwith, as of course, determine the cash value of all estates and the amount of tax to which the same are liable; or the surrogate may so determine the cash value of

all such estates and the amount of tax to which the same are liable, without appointing an appraiser. The superintendent of insurance shall, on the application of any surrogate, determine the value of any such future or contingent estates, income or interest therein limited, contingent, dependent or determinable upon the life or lives of persons in being, upon the facts contained in any such appraiser's report, and certify the same to the surrogate, and his certificate shall be conclusive evidence that the method of computation adopted therein is correct. The comptroller of the state of New York or any person dissatisfied with the appraisement or assessment and determination of tax, may appeal therefrom to the surrogate, within sixty days from the fixing, assessing and determination of tax by the surrogate as herein provided, upon filing in the office of the surrogate a written notice of appeal, which shall state the grounds upon which the appeal is taken. The surrogate shall immediately give notice, upon the determination by him as to the value of any estate which is taxable under this article, and of the tax to which it is liable, to all parties known to be interested therein, including the state comptroller. If, however, it appear at this stage of the proceedings that any of such parties known to be interested in the estate is an infant or an incompetent, the surrogate shall, if the interest of such infant or incompetent is presently involved and is adverse to that of any of the other persons interested therein, appoint a special guardian of such infant; but nothing in this provision shall affect the right of an infant over fourteen years of age or of any one on behalf of an infant under fourteen years of age to nominate and apply for the appointment of a special guardian for such infant at any stage of the proceedings. Within two years after the entry of an order or decree of a surrogate determining the value of an estate and assessing the tax thereon, the comptroller of the state may, if he believes that such appraisal, assessment or determination has been fraudulently, collusively, or erroneously made, make application to a justice of the supreme court of the judicial district in which the former owner of such estate resided, for a reappraisal thereof. The justice to whom such application is made may thereupon appoint a competent person to reappraise such estate. Such appraiser shall possess the powers, be subject to the duties and receive compensation at the rate of five dollars per day for every day actually and necessarily employed in such appraisal. Such compensation shall be payable by the county treasurer or state comptroller, out of any funds he may have on account of any tax imposed under the provisions of this article, upon the certificate of the justice appointing him. The report of such appraiser shall be filed with the justice by whom he was appointed, and thereafter the same proceedings shall be taken and had by and before such justice as are herein provided to be taken and had by and before the surrogate. The determination and assessment of such justice shall supersede the determination and assessment of the surrogate, and

shall be filed by such justice in the office of the state comptroller, and a certified copy thereof transmitted to the surrogate's court of the proper county.

§ 9. Section two hundred and thirty-three of such chapter, as amended by chapter two hundred and eighty-nine, of the laws of eighteen hundred and ninety-eight, is hereby amended to read as follows:

§ 233. **Surrogates' assistants in New York county.**—The surrogates of the county of New York may jointly appoint and at pleasure remove assistants as follows:

1. In New York county, a transfer tax assistant, at an annual salary of four thousand dollars; a transfer tax clerk, at an annual salary of two thousand four hundred dollars; an assistant clerk, at an annual salary of eighteen hundred dollars; a recording clerk, at a salary of thirteen hundred dollars; and shall be entitled to not more than five hundred dollars a year for expenses necessarily incurred in the assessment and collection of taxes under this article. Such salaries and expenses shall be payable monthly by the state comptroller on the certificate and requisition of the surrogates, accompanied by proper vouchers, out of any funds in his hands on account of taxes collected under this article.

§ 10. Section two hundred and thirty-four of such chapter, as amended by chapter three hundred and eighty-nine of the laws of eighteen hundred and ninety-nine, is hereby amended to read as follows:

§ 234. **Surrogates' assistants in Kings and certain other counties.**—The surrogates of the counties mentioned in this section may appoint and at pleasure remove assistants as follows:

1. In the county of Kings, a transfer tax assistant, at an annual salary of four thousand dollars, and a transfer tax clerk, at an annual salary of two thousand dollars; and shall be entitled to not more than five hundred dollars a year, for expenses necessarily incurred in the assessment and collection of taxes under this article.

2. In the county of Westchester, a transfer tax assistant, at an annual salary to be fixed by the surrogate, of not more than two thousand dollars.

3. In the county of Suffolk, a transfer tax clerk, at an annual salary of seven hundred and twenty dollars.

4. In the county of Oneida, not more than two transfer tax clerks, at an annual compensation to be fixed by the surrogate, of not more in the aggregate than twelve hundred dollars.

5. In the county of Ulster, a transfer tax clerk, at an annual salary, to be fixed by the surrogate, of not more than seven hundred and twenty dollars.

6. In the county of Onondaga, a transfer tax clerk, at an annual salary, to be fixed by the surrogate, of not more than twelve hundred dollars.

7. In the county of Monroe, two transfer tax clerks, at an annual salary of seven hundred and fifty dollars each; and shall be entitled to not more than two hundred dollars a year for expenses necessarily incurred in the assessment and collection of taxes under this article.

8. In the county of Erie, a transfer tax clerk, at an annual salary of eighteen hundred dollars.

9. In the county of Albany, a transfer tax clerk at an annual salary to be fixed by the surrogate, of not more than one thousand dollars.

Such salaries and expenses shall be payable monthly by the state comptroller on the certificate and requisition of the surrogate of each such county, accompanied by proper vouchers, out of any funds in his hands on account of taxes collected under this article.

§ 11. Sections two hundred and thirty-five and two hundred and thirty-six of such chapter are hereby amended to read as follows:

§ 235. **Proceedings for the collection of taxes.**—If the county treasurer or state comptroller shall have reason to believe that any tax is due and unpaid in a county in which he is authorized to receive the tax under this article, after the refusal or neglect of the persons liable therefor to pay the same, he shall notify the district attorney of the county, in writing, of such failure or neglect, and such district attorney, if he have probable cause to believe that such tax is due and unpaid, shall apply to the surrogate's court for a citation, citing the persons liable to pay such tax to appear before the court on the day specified, not more than three months after the date of such citation, and show cause why the tax should not be paid. The surrogate, upon such application, and whenever it shall appear to him that any such tax accruing under this article has not been paid as required by law, shall issue such citation and the service of such citation, and the time, manner and proof thereof, and the hearing and determination thereon and the enforcement of the determination or order made by the surrogate shall conform to the provisions of the code of civil procedure for the service of citations out of the surrogate's court, and the hearing and determination thereon and its enforcement so far as the same may be applicable. The surrogate or his clerk shall, upon request of the district attorney, county treasurer, or the comptroller of the state, furnish, without fee, one or more transcripts of such decree, which shall be docketed and filed by the county clerk of any county of the state without fee, in the same manner and with the same effect as provided by law for filing and docketing transcripts of decrees of the surrogate's court. The costs awarded by any such decree after the collection and payment of the tax to the county treasurer or state comptroller may be retained by the district attorney for his own use. Such costs shall be fixed by the surrogate in his discretion, but shall not exceed in any case where there has not been a contest, the sum of one hundred dollars, or where there has been a contest the sum of two hundred and fifty dollars. Whenever the surrogate shall certify that there was probable

cause for issuing a citation and taking the proceedings specified in this section, the state treasurer shall pay or allow to the county treasurer or the state comptroller all expenses incurred for the service of citations and other lawful disbursements not otherwise paid. In proceedings to which any county treasurer or the state comptroller is cited as a party under sections two hundred and thirty and two hundred and thirty-one of this article, the state comptroller is authorized to designate and retain counsel to represent such county treasurer or state comptroller therein, and to direct such county treasurer in a county in which the office of appraiser is not salaried to pay the expenses thereby incurred out of the funds which may be in his hands on account of this tax, and in any other county the state comptroller shall pay such expenses out of any funds which may be in his hands on account of this tax; provided, however, that in the collection of taxes upon estates of non-resident decedents, which estates have been concealed or the taxes thereon evaded, the state comptroller shall not allow for legal services up to and including the entry of the order of the surrogate fixing the tax a sum exceeding ten per centum of the taxes and penalties collected. And the comptroller of the state is hereby authorized, with the approval of the attorney-general, and a justice of the supreme court of the judicial district in which the former owner resided, to compromise and settle the amount of such tax in any case where controversies have arisen or may hereafter arise as to the relationship of the beneficiaries to the former owner thereof.

§ 236. Receipt from the county treasurer and comptroller.—Any person shall upon the payment of the sum of fifty cents be entitled to a receipt from the county treasurer of any county or the state comptroller, or at his option to a copy of a receipt that may have been given by such treasurer or state comptroller for the payment of any tax under this article, under the official seal of such treasurer or comptroller, which receipt shall designate upon what real property, if any, of which any decedent may have died seized, such tax shall have been paid, by whom paid, and whether in full of such tax. Such receipt may be recorded in the clerk's office of the county in which such property is situate, in a book to be kept by him for that purpose, which shall be labeled "transfer tax."

§ 12. Section two hundred and thirty-seven of such chapter, as amended by chapter two hundred and eighty-nine of the laws of eighteen hundred and ninety-eight is hereby amended to read as follows:

§ 237. Fees of county treasurer.—The treasurer of each county in which the office of appraiser is not salaried shall be allowed to retain on all taxes paid and accounted for by him each year under this article, five per centum on the first fifty thousand dollars, three per centum on the next fifty thousand dollars, and one per centum on all additional sums. Such fees shall be in addition to the salaries and fees now allowed by law to such officers.

§ 13. Sections two hundred and thirty-nine and two hundred and forty of such chapter are hereby amended to read as follows:

§ 239. **Reports of surrogate and county clerk.**—Each surrogate shall, on January, April, July and October first of each year, make a report in duplicate, upon the forms furnished by the comptroller containing all the data and matters required to be entered in such book, one of which shall be immediately delivered to the county treasurer and the other transmitted to the state comptroller. The county clerk of each county, except in the counties where the registers perform the duties of the county clerk with respect to the recording of deeds, and when in such counties the registers, shall, at the same times, make reports in duplicate, containing a statement of any deed or other conveyance filed or recorded in his office, of any property, which appears to have been made or intended to take effect in possession or enjoyment after the death of the grantor or vendor, with the name and place of residence of such grantor or vendor, the name and place of residence of the grantee or vendee, and a description of the property transferred, one of which duplicates shall be immediately delivered to the county treasurer or comptroller and the other transmitted to the state comptroller. In a county in which the office of appraiser is salaried but one copy of each such report need be made, which shall be transmitted to the state comptroller as herein required.

§ 240. **Reports of county treasurer.**—Each county treasurer in a county in which the office of appraiser is not salaried shall make a report, under oath, to the state comptroller, on January, April, July and October first of each year, of all taxes received by him under this article, stating for what estate and by whom and when paid. The form of such report may be prescribed by the state comptroller. He shall, at the same time, pay the state treasurer all taxes received by him under this article and not previously paid into the state treasury, and for all such taxes collected by him and not paid into the state treasury within thirty days from the times herein required, he shall pay interest at the rate of ten per centum per annum.

§ 14. Such chapter is hereby amended by inserting therein a new section to be known as section two hundred and forty-a, and to read as follows:

§ 240a. **Report of state comptroller; payment of taxes.**—The state comptroller shall deposit all taxes collected by him under this article in a responsible bank, banking house or trust company in the city of Albany, as, in the opinion of the comptroller are secure, and pay the highest rate of interest to the state for such deposit, to the credit of the state comptroller on account of the transfer tax. And every such bank, banking house or trust company shall execute and file in his office an undertaking to the state, in the sum, and with such sureties, as are required and approved by the comptroller, for the safe keeping and prompt payment on legal demand therefor of all such moneys

held by or on deposit in such bank, banking-house or trust company, with interest thereon on daily balances at such rate as the comptroller may fix. Every such undertaking shall have endorsed thereon, or annexed thereto, the approval of the attorney general as to its form. The state comptroller shall on the first day of each month make a verified return to the state treasurer of all taxes received by him under this article, stating for what estate, and by whom and when paid; and shall credit himself with all expenditures made since his last previous return on account of such taxes, for salary, refunds, or other purpose lawfully chargeable thereto. He shall at the same time pay to the state treasurer the balance of such taxes remaining in his hands at the close of business on the last day of the previous month, as appears from such returns.

§ 15. Section two hundred and forty-one of such chapter is hereby amended to read as follows:

§ 241. **Application of taxes.**—All taxes levied and collected under this article when paid into the treasury of the state shall be applicable to the expenses of the state government and to such other purposes as the legislature shall by law direct.

§ 16. Section two hundred and forty-two of such chapter, as amended by chapter eighty-eight, laws of eighteen hundred and ninety-eight, is hereby amended to read as follows:

§ 242. **Definitions.**—The words “estate” and “property,” as used in this article, shall be taken to mean the property or interest therein of the testator, intestate, grantor, bargainor or vendor, passing or transferred to those not herein specifically exempted from the provisions of this article, and not as the property or interest therein passing or transferred to individual legatees, devisees, heirs, next of kin, grantees, donees or vendees, and shall include all property or interest therein, whether situated within or without this state. The word “transfer,” as used in this article, shall be taken to include the passing of property or any interest therein in possession or enjoyment, present or future, by inheritance, descent, devise, bequest, grant, deed, bargain, sale or gift, in the manner herein prescribed. The words “county treasurer,” “comptroller,” and “district attorney,” as used in this article, shall be taken to mean the treasurer, state comptroller or the district attorney of the county of the surrogate having jurisdiction as provided in section two hundred and twenty-nine of this article.

§ 17. Chapter eight hundred and sixty-one of the laws of eighteen hundred and ninety-five; chapters nine hundred and fifty-two and nine hundred and fifty-three of the laws of eighteen hundred and ninety-six, chapter three hundred and seventy-five of the laws of eighteen hundred and ninety-seven; and chapters two hundred and sixty-nine, two hundred and seventy and four hundred and six of the laws of eighteen hundred and ninety-nine, and chapter three hundred and seventy-nine of the laws of nineteen hundred, are hereby repealed.

Amendment by Laws of 1902, Chap. 496,

In effect April 30, 1902, amended section **230**, to wit:

Section 1. Section two hundred and thirty of chapter nine hundred and eight of the laws of eighteen hundred and ninety-six, as amended by chapter two hundred and eighty-four of the laws of eighteen hundred and ninety-seven; chapter seventy-six of the laws of eighteen hundred and ninety-nine; chapter six hundred and fifty-eight of the laws of nineteen hundred, and chapters one hundred and seventy-three and four hundred and ninety-three of the laws of nineteen hundred and one, is hereby amended to read as follows:

§ 230. **Appointment of appraisers, stenographers, et cetera.**—The state comptroller shall appoint and may at pleasure remove, not to exceed five persons in the county of New York; two persons in the county of Kings, and one person in the counties of Albany, Dutchess, Erie, Monroe, Oneida, Onondaga, Orange, Queens, Rensselaer, Richmond, Suffolk and Westchester, to act as appraisers therein. The appraisers so appointed shall receive an annual salary to be fixed by the state comptroller, together with their actual and necessary traveling expenses and witness fees, as hereinafter provided, payable monthly by the state comptroller out of any funds in his hands or custody on account of transfer tax. The salaries of each of the appraisers so appointed shall not exceed the following amounts: In New York county, four thousand dollars; in Kings county, three thousand dollars; in Erie county, three thousand dollars; in Westchester county, twenty-five hundred dollars; in Albany, Queens, Monroe and Onondaga counties, one thousand five hundred dollars; in Dutchess, Oneida, Suffolk, Orange and Rensselaer counties, one thousand dollars, and in Richmond county, five hundred dollars. Each of the said appraisers shall file with the state comptroller his oath of office and his official bond in the penal sum of not less than one thousand nor more than twenty thousand dollars, in the discretion of the state comptroller, conditioned for the faithful performance of his duties as such appraiser, which bond shall be approved by the attorney-general and the state comptroller. The state comptroller shall retain out of any funds in his hands on account of said tax the following amounts: First. A sum sufficient to provide the appraisers of New York county with five stenographers, and of Kings county with one stenographer, appointed by the state comptroller, whose salary shall not exceed fifteen hundred dollars a year each, and the aggregate of whose salaries in New York county shall not exceed six thousand dollars a year. Second. A sum to be used in defraying the expenses for office rent, stationery, postage, process serving, et cetera, necessarily incurred in the appraisal of estates, not exceeding five thousand dollars a year in New York county, and one thousand dollars a year in Kings county.

In each county in which the office of appraiser is not salaried the county treasurer shall act as appraiser. The surrogate, either upon his own motion, or upon the application of any interested party, including the comptroller of the state of New York, shall by order direct the county treasurer in a county in which the office of appraiser is not salaried, and in any other county the person or one of such persons so designated as appraisers to fix the fair market value of property of persons whose estates shall be subject to the payment of any tax imposed by this article. Whenever a transfer of property is made, upon which there is, or in any contingency there may be, a tax imposed, such property shall be appraised at its clear market value immediately upon such transfer, or as soon thereafter as practicable. The value of every future or limited estate, income, interest or annuity dependent upon any life or lives in being, shall be determined by the rule, method and standard of mortality and value employed by the superintendent of insurance in ascertaining the value of policies of life insurance and annuities for the determination of liabilities of life insurance companies, except that the rate of interest for making such computation shall be five per centum per annum. In estimating the value of any estate or interest in property, to the beneficial enjoyment or possession whereof there are persons or corporations presently entitled thereto, no allowance shall be made in respect of any contingent incumbrance thereon, nor in respect of any contingency upon the happening of which the estate or property or some part thereof or interest therein might be abridged, defeated or diminished; provided, however, that in the event of such incumbrance taking effect as an actual burden upon the interest of the beneficiary, or in the event of the abridgment, defeat or diminution of said estate or property or interest therein as aforesaid, a return shall be made to the person properly entitled thereto of a proportionate amount of such tax in respect of the amount or value of the incumbrance when taking effect, or so much as will reduce the same to the amount which would have been assessed in respect of the actual duration or extent of the estate or interest enjoyed. Such return of tax shall be made in the manner provided by section two hundred and twenty-five of this article. Where any property shall, after the passage of this act, be transferred subject to any charge, estate or interest, determinable by the death of any person, or at any period ascertainable only by reference to death, the increase of benefit accruing to any person or corporation upon the extinction or determination of such charge, estate or interest shall be deemed a transfer of property taxable under the provisions of this act in the same manner as though the person or corporation beneficially entitled thereto had then acquired such increase or benefit from the person from whom the title to their respective estates or interests is derived. When property is transferred in trust or otherwise, and the rights, interest or estates of the transferees are dependent upon contingencies or conditions whereby they may

be wholly or in part created, defeated, extended or abridged, a tax shall be imposed upon said transfer at the highest rate which, on the happening of any of the said contingencies or conditions, would be possible under the provisions of this article, and such tax so imposed shall be due and payable forthwith by the executors or trustees out of the property transferred; provided, however, that on the happening of any contingency whereby the said property, or any part thereof, is transferred to a person or corporation exempt from taxation under the provisions of this article, or to any person taxable at a rate less than the rate imposed and paid, such person or corporation shall be entitled to a return of so much of the tax imposed and paid as is the difference between the amount paid and the amount which said person or corporation should pay under the provisions of this article, with interest thereon at the rate of three per centum per annum from the time of payment. Such return of over-payment shall be made in the manner provided by section two hundred and twenty-five of this article. Estates in expectancy which are contingent or defeasible and in which proceedings for the determination of the tax have not been taken or where the taxation thereof has been held in abeyance, shall be appraised at their full, undiminished value when the persons entitled thereto shall come into the beneficial enjoyment or possession thereof, without diminution for or on account of any valuation theretofore made of the particular estates for purposes of taxation, upon which said estates in expectancy may have been limited. Where an estate for life or for years can be divested by the act or omission of the legatee or devisee it shall be taxed as if there were no possibility of such divesting. All estates upon remainder or reversion, which vested prior to May first, eighteen hundred and ninety-two, but which will not come into actual possession or enjoyment of the person or corporation beneficially interested therein until after the passage of this act shall be appraised and taxed as soon as the person or corporation beneficially interested therein shall be entitled to the actual possession or enjoyment thereof.

Laws of 1905, Chap. 368, in effect June 1, 1905.

AN ACT to amend the tax law, in relation to taxable transfers.

Became a law, May 4, 1905, with the approval of the Governor.

Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Article ten of chapter nine hundred and eight of the laws of eighteen hundred and ninety-six, entitled "An act

in relation to taxation, constituting chapter twenty-four of the general laws," as amended, is hereby amended to read as follows:

ARTICLE X.

TAXABLE TRANSFERS.

- Section 220. Taxable transfers.
- 221. Exceptions and limitations.
 - 222. Accrual and payment of tax.
 - 223. Discount and interest.
 - 224. Lien of tax and collection by executors, administrators and trustees.
 - 225. Refund of tax erroneously paid.
 - 226. Taxes upon devises and bequests in lieu of commissions.
 - 227. Liability of certain corporations to tax.
 - 228. Jurisdiction of the surrogate.
 - 229. Appointment of appraisers, stenographers, et cetera.
 - 230. Proceedings by appraiser.
 - 231. Determination of surrogate.
 - 232. Appeal and other proceedings.
 - 233. Composition of transfer tax upon certain estates.
 - 234. Surrogate's assistants in New York, Kings and other counties.
 - 235. Proceedings by district attorneys.
 - 236. Receipt from county treasurer or comptroller.
 - 237. Fees of county treasurer.
 - 238. Books and forms to be furnished by the state comptroller.
 - 239. Reports of surrogate and county clerk.
 - 240. Reports of county treasurer.
 - 240-a. Report of state comptroller; payment of taxes.
 - 241. Application of taxes.
 - 242. Definitions.
 - 243. Exemptions in article one not applicable.

Section 220. **Taxable transfers.**—A tax shall be and is hereby imposed upon the transfer of any property, real or personal, of the value of five hundred dollars or over, or of any interest therein or income therefrom, in trust or otherwise, to persons

or corporations not exempt by law from taxation on real or personal property, in the following cases:

1. When the transfer is by will or by the intestate laws of this state from any person dying seized or possessed of the property while a resident of the state.

2. When the transfer is by will or intestate law, of property within the state, and the decedent was a nonresident of the state at the time of his death.

3. When the transfer is of property made by a resident or by a nonresident when such nonresident's property is within this state, by deed, grant, bargain, sale or gift made in contemplation of the death of the grantor, vendor or donor, or intended to take effect in possession or enjoyment at or after such death.

4. When any such person or corporation becomes beneficially entitled, in possession or expectancy, to any property or the income thereof by any such transfer, whether made before or after the passage of this act.

5. Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property made either before or after the passage of this act, such appointment when made shall be deemed a transfer taxable under the provisions of this act in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will; and whenever any person or corporation possessing such a power of appointment so derived shall omit or fail to exercise the same within the time provided therefor, in whole or in part, a transfer taxable under the provisions of this act shall be deemed to take place to the extent of such omission or failure, in the same manner as though the persons or corporations thereby becoming entitled to the possession or enjoyment of the property to which such power related had succeeded thereto by a will of the donee of the power failing to exercise such power, taking effect at the time of such omission or failure.

6. The tax imposed hereby shall be at the rate of five per centum upon the clear market value of such property, except as otherwise prescribed in the next section.

§ 221. **Exceptions and limitations.**—When property real or personal or any beneficial interest therein, of the value of less than ten thousand dollars, passes by any such transfer to or for the use of any father, mother, husband, wife, child, brother, sister, wife or widow of a son or the husband of a daughter,

or any child or children adopted as such in conformity with the laws of this state, of the decedent, grantor, donor or vendor, or to any child to whom any such decedent, grantor, donor or vendor for not less than ten years prior to such transfer stood in the mutually acknowledged relation of a parent, provided, however, such relationship began at or before the child's fifteenth birthday and was continuous for said ten years thereafter, and provided also that the parents of such child shall be deceased when such relationship commenced, or to any lineal descendant of such decedent, grantor, donor or vendor born in lawful wedlock, such transfer of property shall not be taxable under this act; if real or personal property, or any beneficial interest therein, so transferred is of the value of ten thousand dollars or more, it shall be taxable under this act at the rate of one per centum upon the clear market value of such property. But any property devised or bequeathed to any person who is a bishop or to any religious, educational, charitable, missionary, benevolent, hospital or infirmary corporation including corporations organized exclusively for bible or tract purposes shall be exempted from and not subject to the provisions of this act. There shall also be exempted from and not subject to the provisions of this act personal property other than money or securities bequeathed to a corporation or association organized exclusively for the moral or mental improvement of men or women or for scientific, literary, library, patriotic, cemetery or historical purposes or for the enforcement of laws relating to children or animals or for two or more of such purposes and used exclusively for carrying out one or more of such purposes. But no such corporation or association shall be entitled to such exemption if any officer, member, or employee thereof shall receive or may be lawfully entitled to receive any pecuniary profit from the operations thereof except reasonable compensation for services in effecting one or more of such purposes or as proper beneficiaries of its strictly charitable purposes; or if the organization thereof for any such avowed purpose be a guise or pretense for directly or indirectly making any other pecuniary profit for such corporation or association or for any of its members or employees or if it be not in good faith organized or conducted exclusively for one or more of such purposes.

§ 222. **Accrual and payment of tax.**—All taxes imposed by this article shall be due and payable at the time of the trans-

fer, except as herein otherwise provided. Taxes upon the transfer of any estate, property or interest therein limited, conditioned, dependent or determinable upon the happening of any contingency or future event by reason of which the fair market value thereof cannot be ascertained at the time of the transfer as herein provided, shall accrue and become due and payable when the persons or corporations beneficially entitled thereto shall come into actual possession or enjoyment thereof. Such tax shall be paid to the state comptroller in a county in which the office of appraiser is salaried, and in other counties, to the county treasurer, and said state comptroller or county treasurer shall give, and every executor, administrator or trustee shall take, duplicate receipts from him of such payment as provided in section two hundred and thirty-six.

§ 223. Discount, and interest.—If such tax is paid within six months from the accrual thereof, a discount of five per centum shall be allowed and deducted therefrom. If such tax is not paid within eighteen months from the accrual thereof, interest shall be charged and collected thereon at the rate of ten per centum per annum from the time the tax accrued; unless by reason of claims made upon the estate, necessary litigation or other unavoidable cause of delay, such tax can not be determined and paid as herein provided, in which case interest at the rate of six per centum per annum shall be charged upon such tax from the accrual thereof until the cause of such delay is removed, after which ten per centum shall be charged.

§ 224. Lien of tax and collection by executors, administrators and trustees.—Every such tax shall be and remain a lien upon the property transferred until paid and the person to whom the property is so transferred, and the executors, administrators and trustees of every estate so transferred shall be personally liable for such tax until its payment. Every executor, administrator or trustee, shall have full power to sell so much of the property of the decedent as will enable him to pay such tax in the same manner as he might be entitled by law to do for the payment of the debts of the testator or intestate. Any such executor, administrator or trustee having in charge or in trust any legacy or property for distribution subject to such tax shall deduct the tax therefrom and shall pay over the same to the state comptroller or county treasurer, as herein provided. If such legacy or property be not in money, he shall collect the tax thereon upon the appraised value thereof

from the person entitled thereto. He shall not deliver or be compelled to deliver any specific legacy or property subject to tax under this article to any person until he shall have collected the tax thereon. If any such legacy shall be charged upon or payable out of real property, the heir or devisee shall deduct such tax therefrom and pay it to the executor, administrator or trustee, and the tax shall remain a lien or charge on such real property until paid; and the payment thereof shall be enforced by the executor, administrator or trustee in the same manner that payment of the legacy might be enforced, or by the district attorney under section two hundred and thirty-five of this chapter. If any such legacy shall be given in money to any such person for a limited period, the executor, administrator or trustee shall retain the tax upon the whole amount, but if it be not in money, he shall make application to the court having jurisdiction of an accounting by him, to make an apportionment, if the case require it, of the sum to be paid into his hands by such legatees, and for such further order relative thereto as the case may require.

§ 225. **Refund of tax erroneously paid.**—If any debts shall be proven against the estate of a decedent after the payment of any legacy or distributive share thereof, from which any such tax has been deducted or upon which it has been paid by the person entitled to such legacy or distributive share, and such person is required by order of the surrogate having jurisdiction, on notice to the state comptroller, to refund the amount of such debts or any part thereof, an equitable proportion of the tax shall be repaid to him by the executor, administrator or trustee, if the tax has not been paid to the state comptroller or county treasurer; or if such tax has been paid to such state comptroller or county treasurer, such officer shall refund out of the funds in his hands or custody to the credit of such taxes such equitable proportion of the tax, and credit himself with the same in the account required to be rendered by him under this article. If after the payment of any tax in pursuance of an order fixing such tax, made by the surrogate having jurisdiction, such order be modified or reversed within two years from and after the date of entry of the order fixing the tax, on due notice to the state comptroller, the state comptroller shall, if such tax was paid in a county in which the office of appraiser is salaried, refund to the executor, administrator, trustee, person or persons by whom such tax has been paid, the amount of any moneys

paid or deposited on account of such tax in excess of the amount of the tax fixed by the order modified or reversed, out of the funds in his hands or custody to the credit of such taxes, and to credit himself with the same in the account required to be rendered by him under this act, or if paid in a county in which the office of appraiser is not salaried, he shall by warrant direct and allow the county treasurer of the county to refund such amount in the same manner; but no application for such refund shall be made after one year from such reversal or modification, and the state comptroller shall deduct from the fees allowed by this article to the county treasurer the amount theretofore allowed him upon such overpayment. Where it shall be proved to the satisfaction of the surrogate that deductions for debts were allowed upon the appraisal, since proved to have been erroneously allowed, it shall be lawful for such surrogate to enter an order assessing the tax upon the amount wrongfully or erroneously deducted.

§ 226. Taxes upon devises and bequests in lieu of commissions.—If a testator bequeaths or devises property to one or more executors or trustees in lieu of their commissions or allowances, or makes them his legatees to an amount exceeding the commissions or allowances prescribed by law for an executor or trustee, the excess in value of the property so bequeathed or devised, above the amount of commissions or allowances prescribed by law in similar cases shall be taxable under this article.

§ 227. Liability of certain corporations to tax.—If a foreign executor, administrator or trustee shall assign or transfer any stock or obligations in this state standing in the name of a decedent, or in trust for a decedent, liable to any such tax, the tax shall be paid to the state comptroller or the treasurer of the proper county on the transfer thereof. No safe deposit company, trust company, corporation, bank or other institution, person or persons having in possession or under control securities, deposits, or other assets belonging to or standing in the name of a decedent who was a resident or nonresident, or belonging to, or standing in the joint names of such a decedent and one or more persons, including the shares of the capital stock of, or other interests in, the safe deposit company, trust company, corporation, bank or other institution making the delivery or transfer herein provided, shall deliver or transfer the same to the executors, administrators or legal representatives of said decedent, or to the survivor or survivors when held

in the joint names of a decedent and one or more persons, or upon their order or request, unless notice of the time and place of such intended delivery or transfer be served upon the state comptroller at least ten days prior to said delivery or transfer; nor shall any such safe deposit company, trust company, corporation, bank or other institution, person or persons deliver or transfer any securities, deposits or other assets belonging to or standing in the name of a decedent, or belonging to, or standing in the joint names of a decedent and one or more persons, including the shares of the capital stock of, or other interests in, the safe deposit company, trust company, corporation, bank or other institution making the delivery or transfer, without retaining a sufficient portion or amount thereof to pay any tax and interest which may thereafter be assessed on account of the delivery or transfer of such securities, deposits or other assets, including the shares of the capital stock of, or other interests in, the safe deposit company, trust company, corporation, bank or other institution making the delivery or transfer, under the provisions of this article, unless the state comptroller consents thereto in writing. And it shall be lawful for the said state comptroller, personally or by representative, to examine said securities, deposits or assets at the time of such delivery or transfer. Failure to serve such notice or failure to allow such examination, or failure to retain a sufficient portion or amount to pay such tax and interest as herein provided shall render said safe deposit company, trust company, corporation, bank or other institution, person or persons liable to the payment of the amount of the tax and interest due or thereafter to become due upon said securities, deposits or other assets, including the shares of the capital stock of, or other interests in, the safe deposit company, trust company, corporation, bank or other institution making the delivery or transfer, and in addition thereto, a penalty of one thousand dollars; and the payment of such tax and interest thereon, or of the penalty above prescribed, or both, may be enforced in an action brought by the state comptroller in any court of competent jurisdiction.

§ 228. **Jurisdiction of the surrogate.**—The surrogate's court of every county of the state having jurisdiction to grant letters testamentary or of administration upon the estate of a decedent whose property is chargeable with any tax under this article, or to appoint a trustee of such estate or any part thereof, or to give ancillary letters thereon, shall have jurisdiction to

hear and determine all questions arising under the provisions of this article, and to do any act in relation thereto authorized by law to be done by a surrogate in other matters or proceedings coming within his jurisdiction; and if two or more surrogate's courts shall be entitled to exercise any such jurisdiction, the surrogate first acquiring jurisdiction hereunder shall retain the same to the exclusion of every other surrogate. Every petition for ancillary letters testamentary or ancillary letters of administration made in pursuance of the provisions of article seven, title three, chapter eighteen of the code of civil procedure shall set forth the name of the state comptroller as a person to be cited as therein prescribed, and a true and correct statement of all the decedent's property in this state and the value thereof; and upon the presentation thereof the surrogate shall issue a citation directed to the state comptroller; and upon the return of the citation the surrogate shall determine the amount of the tax which may be or become due under the provisions of this article and his decree awarding the letters may contain any provision for the payment of such tax or the giving of security therefor which might be made by such surrogate if the state comptroller were a creditor of the decedent.

§ 229. **Appointment of appraisers, stenographers, et cetera.**—The state comptroller shall appoint and may at pleasure remove not to exceed six persons in the county of New York; two persons in the county of Kings, and one person in the counties of Albany, Dutchess, Erie, Monroe, Oneida, Onondaga, Orange, Queens, Rensselaer, Richmond, Suffolk and Westchester, to act as appraisers therein. The appraisers so appointed shall receive an annual salary to be fixed by the state comptroller, together with their actual and necessary traveling expenses and witness fees, as hereinafter provided, payable monthly by the state comptroller out of any funds in his hands or custody on account of transfer tax. The salaries of each of the appraisers so appointed shall not exceed the following amounts: In New York county, four thousand dollars; in Kings county, three thousand dollars; in Erie county, three thousand dollars; in Westchester and Albany counties, twenty-five hundred dollars; in Queens, Monroe and Onondaga counties, one thousand five hundred dollars; in Dutchess, Oneida, Orange, Rensselaer and Suffolk counties, one thousand dollars, and in Richmond county, five hundred dollars. Each of the said appraisers shall file with the state comptroller his oath of office and his official bond

in the penal sum of not less than one thousand dollars, in the discretion of the state comptroller, conditioned for the faithful performance of his duties as such appraiser, which bond shall be approved by the attorney-general and the state comptroller. The state comptroller shall retain out of any funds in his hands on account of said tax the following amounts: First. A sum sufficient to provide the appraisers of New York county with five stenographers, of Kings county with two stenographers, and of Erie county with one clerk, appointed by the state comptroller, whose salary shall not exceed fifteen hundred dollars a year each. Second. A sum to be used in defraying the expenses for office rent, stationery, postage, process serving, et cetera, necessarily incurred in the appraisal of estates, not exceeding seven thousand five hundred dollars a year in New York county, and one thousand five hundred dollars a year in Kings county.

§ 230. **Proceedings by appraiser.**—In each county in which the office of appraiser is not salaried the county treasurer shall act as appraiser. The surrogate, either upon his own motion, or upon the application of any interested person, including the state comptroller, shall by order direct the person or one of the persons appointed pursuant to section two hundred and twenty-nine of this article in counties in which the office of appraiser is salaried, and in other counties, the county treasurer, to fix the fair market value of property of persons whose estates shall be subject to the payment of any tax imposed by this article.

Every such appraiser shall forthwith give notice by mail to all persons known to have a claim or interest in the property to be appraised, including the state comptroller, and to such persons as the surrogate may by order direct, of the time and place when he will appraise such property. He shall at such time and place, appraise the same at its fair market value as herein prescribed; and for that purpose the said appraiser is authorized to issue subpoenas and to compel the attendance of witnesses before him and to take the evidence of such witnesses under oath concerning such property and the value thereof; and he shall make report thereof and of such value in writing, to the said surrogate, together with the depositions of the witnesses examined, and such other facts in relation thereto and to said matter as the surrogate may order or require. Every appraiser, except in the counties in which the office of appraiser is salaried, for which provision is hereinbefore made, shall be paid by the state comptroller and after the audit of said state

comptroller, his actual and necessary traveling expenses and the fees paid such witnesses, which fees shall be the same as those now paid to witnesses subpoenaed to attend in courts of record, payment to be made out of funds in the hands of the county treasurer of the proper county on account of the tax imposed under the provisions of this article. Appraisers appointed under this article in proceedings pending at the time the amendment to this section takes effect shall complete the appraisals therein and file their reports as herein provided, and shall be entitled to the compensation authorized by law at the time of their appointment, to be paid by the state comptroller in counties in which the office of appraiser is salaried, and in other counties by the county treasurer, out of any moneys in his hands on account of this tax.

The value of every future or limited estate, income, interest or annuity dependent upon any life or lives in being, shall be determined by the rule, method and standard of mortality and value employed by the superintendent of insurance in ascertaining the value of policies of life insurance and annuities for the determination of liabilities of life insurance companies, except that the rate of interest for making such computation shall be five per centum per annum.

In estimating the value of any estate or interest in property, to the beneficial enjoyment or possession whereof there are persons or corporations presently entitled thereto, no allowance shall be made on account of any contingent incumbrance thereon, nor on account of any contingency upon the happening of which the estate or property or some part thereof or interest therein might be abridged, defeated or diminished; provided, however, that in the event of such incumbrance taking effect as an actual burden upon the interest of the beneficiary, or in the event of the abridgment, defeat or diminution of said estate or property or interest therein as aforesaid, a return shall be made to the person properly entitled thereto of a proportionate amount of such tax on account of the incumbrance when taking effect, or so much as will reduce the same to the amount which would have been assessed on account of the actual duration or extent of the estate or interest enjoyed. Such return of tax shall be made in the manner provided by section two hundred and twenty-five of this article.

Where any property shall, after the passage of this act, be transferred subject to any charge, estate or interest, determin-

able by the death of any person, or at any period ascertainable only by reference to death, the increase accruing to any person or corporation upon the extinction or determination of such charge, estate or interest, shall be deemed a transfer of property taxable under the provisions of this act in the same manner as though the person or corporation beneficially entitled thereto had then acquired such increase from the person from whom the title to their respective estates or interests is derived.

When property is transferred in trust or otherwise, and the rights, interest or estates of the transferees are dependent upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended or abridged, a tax shall be imposed upon said transfer at the highest rate which, on the happening of any of the said contingencies or conditions, would be possible under the provisions of this article and such tax so imposed shall be due and payable forthwith by the executors or trustees out of the property transferred; provided, however, that on the happening of any contingency whereby the said property, or any part thereof, is transferred to a person or corporation exempt from taxation under the provisions of this article, or to any person taxable at a rate less than the rate imposed and paid, such person or corporation shall be entitled to a return of so much of the tax imposed and paid as is the difference between the amount paid and the amount which said person or corporation should pay under the provisions of this article, with interest thereon at the rate of three per centum per annum from the time of payment. Such return of overpayment shall be made in the manner provided by section two hundred and twenty-five of this article.

Estates in expectancy which are contingent or defeasible and in which proceedings for the determination of the tax have not been taken or where the taxation thereof has been held in abeyance, shall be appraised at their full, undiminished value when the persons entitled thereto shall come into the beneficial enjoyment or possession thereof, without diminution for or on account of any valuation theretofore made of the particular estates for purposes of taxation, upon which said estates in expectancy may have been limited.

Where an estate for life or for years can be divested by the act or omission of the legatee or devisee it shall be taxed as if there were no possibility of such divesting.

The report of the appraiser shall be made in duplicate, one

of which duplicates shall be filed in the office of the surrogate and the other in the office of the state comptroller.

§ 231. **Determination of surrogate.**—From such report of appraisal and other proof relating to any such estate before the surrogate, the surrogate shall forthwith, as of course, determine the cash value of all estates and the amount of tax to which the same are liable; or the surrogate may so determine the cash value of all such estates and the amount of tax to which the same are liable, without appointing an appraiser.

The superintendent of insurance shall, on the application of any surrogate, determine the value of any such future or contingent estates, income or interest therein limited, contingent, dependent or determinable upon the life or lives of persons in being, upon the facts contained in any such appraiser's report, and certify the same to the surrogate, and his certificate shall be conclusive evidence that the method of computation adopted therein is correct.

The surrogate shall immediately give notice, upon the determination by him as to the value of any estate which is taxable under this article, and of the tax to which it is liable, to all persons known to be interested therein, and shall immediately forward a copy of such taxing order to the state comptroller. The surrogate shall also forward to the state comptroller copies of all orders entered by him in relation to or affecting in any way the transfer tax on any estate, including orders of exemption.

If, however, it appear at any stage of the proceedings that any of such persons known to be interested in the estate is an infant or an incompetent, the surrogate may, if the interest of such infant or incompetent is presently involved and is adverse to that of any of the other persons interested therein, appoint a special guardian of such infant; but nothing in this provision shall affect the right of an infant over fourteen years of age or of any one on behalf of an infant under fourteen years of age to nominate and apply for the appointment of a special guardian for such infant at any stage of the proceedings.

§ 232. **Appeal and other proceedings.**—The state comptroller or any person dissatisfied with the appraisalment or assessment and determination of tax may appeal therefrom to the surrogate within sixty days from the fixing, assessing and determination of tax by the surrogate as herein provided, upon filing in the office of the surrogate a written notice of appeal, which shall state the grounds upon which the appeal is taken.

Within two years after the entry of an order or decree of a surrogate determining the value of an estate and assessing the tax thereon, the state comptroller may, if he believes that such appraisal, assessment or determination has been fraudulently, collusively, or erroneously made, make application to a justice of the supreme court of the judicial district in which the former owner of such estate resided, for a reappraisal thereof. The justice to whom such application is made may thereupon appoint a competent person to reappraise such estate. Such appraiser shall possess the powers and be subject to the duties of an appraiser under section two hundred and thirty and shall receive compensation at the rate of five dollars per day for every day actually and necessarily employed in such appraisal. Such compensation shall be payable by the state comptroller or county treasurer out of any funds he may have on account of any tax imposed under the provisions of this article, upon the certificate of the justice appointing him. The report of such appraiser shall be filed with the justice by whom he was appointed, and thereafter the same proceedings shall be taken and had by and before such justice as are herein provided to be taken and had by and before the surrogate. The determination and assessment of such justice shall supersede the determination and assessment of the surrogate, and shall be filed by such justice in the office of the state comptroller, and a certified copy thereof transmitted to the surrogate's court of the proper county.

§ 233. **Composition of transfer tax upon certain estates.**—The state comptroller, by and with the consent of the attorney-general expressed in writing, is hereby empowered and authorized to enter into an agreement with the trustees of any estate in which remainders or expectant estates have been of such a nature, or so disposed and circumstanced that the taxes therein were held not presently payable, or where the interests of the legatees or devisees were not ascertainable under the provisions of chapter four hundred and eighty-three of the laws of eighteen hundred and eighty-five; chapter three hundred and ninety-nine of the laws of eighteen hundred and ninety-two, or chapter nine hundred and eight of the laws of eighteen hundred and ninety-six, and the several acts amendatory thereof and supplemental thereto; and to compound such taxes upon such terms as may be deemed equitable and expedient; and to grant discharge to said trustees upon the payment of the taxes

provided for in such composition, provided, however, that no such composition shall be conclusive in favor of said trustees as against the interests of such cestuis que trust as may possess either present rights of enjoyment, or fixed, absolute or indefeasible rights of future enjoyment, or of such as would possess such rights in the event of the immediate termination of particular estates, unless they consent thereto, either personally, when competent, or by guardian or committee. Composition or settlement made or effected under the provisions of this section shall be executed in triplicate, and one copy filed in the office of the state comptroller, one copy in the office of the surrogate of the county in which the tax was paid, and one copy delivered to the executors, administrators or trustees who shall be parties thereto.

§ 234. **Surrogate's assistants in New York, Kings and other counties.**—The state comptroller may, upon the recommendation of the surrogate, appoint, and may at pleasure remove assistants and clerks in the surrogate's offices of the following counties, at annual salaries to be fixed by him not to exceed the amounts hereinafter specified:

1. In New York county, a transfer tax assistant, four thousand dollars; a transfer tax clerk, two thousand four hundred dollars; an assistant clerk, eighteen hundred dollars; a recording clerk, thirteen hundred dollars; a stenographer, eight hundred dollars; and shall be entitled to expend not more than five hundred dollars a year in such office for expenses necessarily incurred in the assessment and collection of taxes under this article.

2. In Kings county, a transfer tax assistant, four thousand dollars; a transfer tax clerk, two thousand dollars; an assistant clerk, fifteen hundred dollars; and shall be entitled to expend not more than five hundred dollars a year for expenses necessarily incurred in the assessment and collection of taxes under this article.

3. In Erie county, a transfer tax clerk, eighteen hundred dollars.

4. In Westchester county, a transfer tax assistant, two thousand dollars.

5. In Albany county, a transfer tax clerk, one thousand dollars.

6. In Queens county, a transfer tax clerk, one thousand dollars.

7. In Onondaga county, a transfer tax clerk, twelve hundred dollars.

8. In Monroe county, two transfer tax clerks, seven hundred and fifty dollars each; and shall be entitled to expend not more than two hundred dollars a year for expenses necessarily incurred in the assessment and collection of taxes under this article.

9. In Dutchess county, a transfer tax clerk, nine hundred dollars.

10. In Oneida county, not more than two transfer tax clerks, twelve hundred dollars in the aggregate.

11. In Suffolk county, a transfer tax clerk, one thousand dollars.

12. In Ulster county, a transfer tax clerk, seven hundred and twenty dollars.

Such salaries and expenses shall be paid monthly by the state comptroller, upon proper vouchers, out of any funds in his hands on account of taxes collected under this article.

§ 235. **Proceedings by district attorneys.**—If, after the expiration of eighteen months from the accrual of any tax under this article, such tax shall remain due and unpaid, after the refusal or neglect of the persons liable therefor to pay the same, the state comptroller shall notify the district attorney of the county, in writing, of such failure or neglect, and such district attorney shall apply to the surrogate's court for a citation, citing the persons liable to pay such tax to appear before the court on the day specified, not more than three months after the date of such citation, and show cause why the tax should not be paid. The surrogate, upon such application, and whenever it shall appear to him that any such tax accruing under this article has not been paid as required by law, shall issue such citation and the service of such citation, and the time, manner and proof thereof, and the hearing and determination thereon and the enforcement of the determination or order made by the surrogate shall conform to the provisions of the code of civil procedure for the service of citations out of the surrogate's court, and the hearing and determination thereon and its enforcement so far as the same may be applicable. The surrogate or his clerk shall, upon request of the district attorney or the state comptroller, furnish, without fee, one or more transcripts of such decree, which shall be docketed and filed by the county clerk of any county of the state without fee, in the same manner and with the same effect as provided by law for filing and docket-

ing transcripts of decrees of the surrogate's court. The cost awarded by any such decree after the collection and payment of the tax to the state comptroller or county treasurer may be retained by the district attorney for his own use. Such costs shall be fixed by the surrogate in his discretion, but shall not exceed in any case where there has not been a contest, the sum of one hundred dollars, or where there has been a contest the sum of two hundred and fifty dollars. Whenever the surrogate shall certify that there was probable cause for issuing a citation and taking the proceedings specified in this section, the state comptroller, after the same shall have been audited by him, shall pay all expenses incurred for the service of citations and other lawful disbursements not otherwise paid, from funds in his hands on account of such tax, or in a county in which the office of appraiser is not salaried, by a warrant upon the county treasurer of such county for the payment by him of the same from funds in his hands on account of such tax. In proceedings to which the state comptroller is cited as a party under sections two hundred and twenty-nine and two hundred and thirty of this article, he is authorized to designate and retain counsel to represent him and to pay the expenses thereby incurred out of the funds which may be in his hands on account of this tax in any case in a county where the office of appraiser is salaried, and in any other county the state comptroller shall by warrant direct the county treasurer to pay such expenses out of any funds which may be in his hands on account of this tax; provided, however, that in the collection of taxes upon estates of non-resident decedents the state comptroller shall not allow for legal services up to and including the entry of the order of the surrogate fixing the tax a sum exceeding ten per centum of the taxes and penalties collected.

§ 236. Receipts from county treasurer or comptroller.—One of the duplicate receipts issued for the payment of any tax under this article, as provided by section two hundred and twenty-two, shall be countersigned by the state treasurer if the same was issued by the state comptroller, and by the state comptroller if issued by any county treasurer. The officer so countersigning the same shall charge the officer receiving the tax with the amount thereof and affix the seal of his office to the same and return to the proper person; but no executor, administrator or trustee shall be entitled to a final accounting of an estate in settlement of which a tax is due under the provi-

sions of this article unless he shall produce a receipt so sealed and countersigned, or a certified copy thereof. Any person shall, upon the payment of fifty cents to the officer issuing such receipt, be entitled to a duplicate thereof, to be signed, sealed and countersigned in the same manner as the original.

Any person shall, upon the payment of fifty cents, be entitled to a certificate of the state comptroller that the tax upon the transfer of any real estate of which any decedent died seized has been paid, such certificate to designate the real property upon which such tax is paid, the name of the person so paying the same, and whether in full of such tax. Such certificate may be recorded in the office of the county clerk or register of the county where such real property is situate, in a book to be kept by him for that purpose, which shall be labeled "transfer tax."

§ 237. **Fees of county treasurer.**—The treasurer of each county in which the office of appraiser is not salaried shall be allowed to retain on all taxes paid and accounted for by him each fiscal year under this article, five per centum on the first fifty thousand dollars, three per centum on the next fifty thousand dollars, and one per centum on all additional sums. Such fees shall be in addition to the salaries and fees now allowed by law to such officers.

§ 238. **Books and forms to be furnished by the state comptroller.**—The state comptroller shall furnish to each surrogate, a book, which shall be a public record, and in which he shall enter the name of every decedent upon whose estate an application to him has been made for the issue of letters of administration, or letters testamentary, or ancillary letters, the date and place of death of such decedent, the estimated value of his real and personal property, the names, places of residence and relationship to him of his heirs-at-law, the names and places of residence of the legatees and devisees in any will of any such decedent, the amount of each legacy and the estimated value of any real property devised therein, and to whom devised. These entries shall be made from the data contained in the papers filed on any such application, or in any proceeding relating to the estate of the decedent. The surrogate shall also enter in such book the amount of the personal property of any such decedent, as shown by the inventory thereof when made and filed in his office, and the returns made by any appraiser appointed by him under this article, and the value of annuities, life estates, terms of years, and other property of any such

decendent or given by him in his will or otherwise, as fixed by the surrogate, and the tax assessed thereon, and the amounts of any receipts for payment of any tax on the estate of such decendent under this article filed with him. The state comptroller shall also furnish to each surrogate forms for the reports to be made by such surrogate, which shall correspond with the entries to be made in such book.

§ 239. **Reports of surrogate and county clerk**—Each surrogate shall, on January, April, July and October first of each year make a report, upon the forms furnished by the comptroller containing all the data and matters required to be entered in such book, which shall be immediately forwarded to the state comptroller. The county clerk of each county, except in the counties where the registers perform the duties of the county clerk with respect to the recording of deeds, and when in such counties the registers, shall, at the same times, make reports containing a statement of any deed or other conveyance filed or recorded in his office, of any property, which appears to have been made or intended to take effect in possession or enjoyment after the death of the grantor or vendor, with the name and place of residence of such grantor or vendor, the name and place of residence of the grantee or vendee, and a description of the property transferred, which shall be immediately forwarded to the state comptroller.

§ 240. **Reports of county treasurer**.—Each county treasurer in a county in which the office of appraiser is not salaried shall make a report, under oath, to the state comptroller, on January, April, July and October first of each year, of all taxes received by him under this article, stating for what estate and by whom and when paid. The form of such report may be prescribed by the state comptroller. He shall, at the same time, pay the state treasurer all taxes received by him under this article and not previously paid into the state treasury, and for all such taxes collected by him and not paid into the state treasury within thirty days from the times herein required, he shall pay interest at the rate of ten per centum per annum.

§ 240-a. **Report of state comptroller; payment of taxes**.—The state comptroller shall deposit all taxes collected by him under this article in a responsible bank, banking house or trust company in the city of Albany, which shall pay the highest rate of interest to the state for such deposit, to the credit of the state comptroller on account of the transfer tax. And

every such bank, banking house or trust company, shall execute and file in his office an undertaking to the state, in the sum, and with such sureties, as are required and approved by the comptroller, for the safe keeping and prompt payment on legal demand therefor of all such moneys held by or on deposit in such bank, banking house or trust company, with interest thereon on daily balances at such rate as the comptroller may fix. Every such undertaking shall have endorsed thereon, or annexed thereto, the approval of the attorney general as to its form. The state comptroller shall on the first day of each month make a verified return to the state treasurer of all taxes received by him under this article, stating for what estate, and by whom and when paid; and shall credit himself with all expenditures made since his last previous return on account of such taxes, for salary, refunds, or other purposes lawfully chargeable thereto. He shall at the same time pay to the state treasurer the balance of such taxes remaining in his hands at the close of business on the last day of the previous month, as appears from such returns.

§ 241. **Application of taxes.**—All taxes levied and collected under this article when paid into the treasury of the state shall be applicable to the expenses of the state government and to such other purposes as the legislature shall by law direct.

§ 242. **Definitions.**—The words “estate” and “property,” as used in this article, shall be taken to mean the property or interest therein of the testator, intestate, grantor, bargainor or vendor, passing or transferred to those not herein specifically exempted from the provisions of this article, and not as the property or interest therein passing or transferred to individual legatees, devisees, heirs, next of kin, grantees, donees or vendees, and shall include all property or interest therein, whether situated within or without this state. The word “transfer,” as used in this article, shall be taken to include the passing of property or any interest therein in possession or enjoyment, present or future, by inheritance, descent, devise, bequest, grant, deed, bargain, sale or gift, in the manner herein prescribed. The words “county treasurer” and “district attorney,” as used in this article, shall be taken to mean the treasurer or the district attorney of the county of the surrogate having jurisdiction as provided in section two hundred and twenty-eight of this article.

§ 243. **Exemptions in article one not applicable.**—The exemptions enumerated in section four of the tax law, of which

this article is a part, shall not be construed as being applicable in any manner to the provisions of article ten hereof.

§ 2. This act shall take effect June first, nineteen hundred and five.

Amendment by Laws of 1908, Chap. 310,

In effect May 18, 1908, amends sections **220, 221, 227, 229, 232, 235,** and **237** so as to read as follows:

§ 220. **Taxable transfers.**—A tax shall be and is hereby imposed upon the transfer of any property, real or personal, of the value of five hundred dollars or over, or of any interest therein or income therefrom, in trust or otherwise, to persons or corporations not exempt by law from taxation on real or personal property, in the following cases.

1. When the transfer is by will or by the intestate laws of this state from any person dying seized or possessed of the property while a resident of the state.

2. When the transfer is by will or intestate law, of property within the state, and the decedent was a nonresident of the state at the time of his death.

2-a. Whenever the property of a resident decedent, or the property of a nonresident decedent within this state, transferred by will, is not specifically bequeathed or devised, such property shall, for the purposes of this act, be deemed to be transferred proportionately to, and divided pro rata among all the general legatees and devisees named in said decedent's will, including all transfers under a residuary clause of such will.

3. When the transfer is of property made by a resident or by a nonresident when such nonresident's property is within this state, by deed, grant, bargain, sale or gift made in contemplation of the death of the grantor, vendor or donor, or intended to take effect in possession or enjoyment at or after such death.

4. When any such person or corporation becomes beneficially entitled, in possession or expectancy, to any property or the income thereof by any such transfer, whether made before or after the passage of this act.

5. Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property made either before or after the passage of this act, such appointment when made shall be deemed a transfer taxable under the provisions of this act in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will; and whenever any person or corporation possessing such a power of appointment so derived shall omit or fail to exercise the same within the time provided there-

for, in whole or in part, a transfer taxable under the provisions of this act shall be deemed to take place to the extent of such omission or failure, in the same manner as though the persons or corporations thereby becoming entitled to the possession or enjoyment of the property to which such power related had succeeded thereto by a will of the donee of the power failing to exercise such power, taking effect at the time of such omission or failure.

6. The tax imposed hereby shall be at the rate of five per centum upon the clear market value of such property, except as otherwise prescribed in the next section.

§ 221. **Exceptions and limitations.**—When property real or personal or any beneficial interest therein, of the value of less than ten thousand dollars, passes by any such transfer to or for the use of any father, mother, husband, wife, child, brother, sister, wife or widow of a son or the husband of a daughter, or any child or children adopted as such in conformity with the laws of this state, of the decedent, grantor, donor or vendor, or to any child to whom any such decedent, grantor, donor or vendor for not less than ten years prior to such transfer stood in the mutually acknowledged relation of a parent, provided, however, such relationship began at or before the child's fifteenth birthday and was continuous for said ten years thereafter, and provided also that, except in the case of a stepchild, the parents of such child shall be deceased when such relationship commenced, or to any lineal descendent of such decedent, grantor, donor or vendor born in lawful wedlock, such transfer of property shall not be taxable under this act; if real or personal property, or any beneficial interest therein, so transferred is of the value of ten thousand dollars or more, it shall be taxable under this act at the rate of one per centum upon the clear market value of such property. But any property devised or bequeathed to any person who is a bishop or to any religious, educational, charitable, missionary, benevolent, hospital or infirmary corporation including corporations organized exclusively for bible or tract purposes shall be exempted from and not subject to the provisions of this act. There shall also be exempted from and not subject to the provisions of this act personal property other than money or securities bequeathed to a corporation or association organized exclusively for the moral or mental improvement of men or women, or for scientific, literary, library, patriotic, cemetery or historical purposes or for the enforcement of laws relating to children or animals or for two or more of such purposes and used exclusively for carrying out one or more of such purposes. But no such corporation or association shall be entitled to such exemption if any officer, member or employee thereof shall receive or may be lawfully entitled to receive any pecuniary profit from the operations thereof except reasonable compensation for services in effecting one or more of such purposes or as proper beneficiaries of its strictly charitable purposes; or if the organization thereof for any such avowed pur-

pose be a guise or pretense for directly or indirectly making any other pecuniary profit for such corporation or association or for any of its members or employees or if it be not in good faith organized or conducted exclusively for one or more of such purposes.

§ 227. **Liability of certain corporations to tax.**—If a foreign executor, administrator or trustee shall assign or transfer any stock or obligations in this state standing in the name of a decedent, or in trust for a decedent, liable to any such tax, the tax shall be paid to the state comptroller or the treasurer of the proper county on the transfer thereof. No safe deposit company, trust company, corporation, bank or other institution, person or persons having in possession or under control securities, deposits, or other assets belonging to or standing in the name of a decedent who was a resident or nonresident, or belonging to, or standing in the joint names of such a decedent and one or more persons, including the shares of the capital stock of, or other interests in, the safe deposit company, trust company, corporation, bank or other institution making the delivery or transfer herein provided, shall deliver or transfer the same to the executors, administrators or legal representatives of said decedent, or to the survivor or survivors when held in the joint names of a decedent and one or more persons, or upon their order or request, unless notice of the time and place of such intended delivery or transfer be served upon the state comptroller at least ten days prior to said delivery or transfer; nor shall any such safe deposit company, trust company, corporation, bank or other institution, person or persons deliver or transfer any securities, deposits or other assets belonging to or standing in the name of a decedent, or belonging to, or standing in the joint names of a decedent and one or more persons, including the shares of the capital stock of, or other interests in, the safe deposit company, trust company, corporation, bank or other institution making the delivery or transfer, without retaining a sufficient portion or amount thereof to pay any tax and interest which may thereafter be assessed on account of the delivery or transfer of such securities, deposits or other assets, including the shares of the capital stock of, or other interests in, the safe deposit company, trust company, corporation, bank or other institution making the delivery or transfer, under the provisions of this article, unless the state comptroller consents thereto in writing. And it shall be lawful for the said state comptroller, personally or by representative, to examine said securities, deposits or assets at the time of such delivery or transfer. Failure to serve such notice or failure to allow such examination, or failure to retain a sufficient portion or amount to pay such tax and interest as herein provided shall render said safe deposit company, trust company, corporation, bank or other institution, person or persons liable to the payment of the amount of the tax and interest due or thereafter to become due upon said securities, deposits or other assets, including the shares of the capital stock of, or other inter-

ests in, the safe deposit company, trust company, corporation, bank or other institution making the delivery or transfer, and in addition thereto, a penalty of not less than five or more than twenty-five thousand dollars; and the payment of such tax and interest thereon, or of the penalty above prescribed, or both, may be enforced in an action brought by the state comptroller in any court of competent jurisdiction.

§ 229. **Appointment of appraisers, stenographers, et cetera.**—The state comptroller shall appoint and may at pleasure remove not to exceed six persons in the county of New York; two persons in the county of Kings, and one person in the counties of Albany, Dutchess, Erie, Monroe, Nassau, Oneida, Onondaga, Orange, Queens, Rensselaer, Richmond, Suffolk and Westchester, to act as appraisers therein. The appraisers so appointed shall receive an annual salary to be fixed by the state comptroller, together with their actual and necessary traveling expenses and witness fees, as hereinafter provided, payable monthly by the state comptroller out of any funds in his hands or custody on account of transfer tax. The salaries of each of the appraisers so appointed shall not exceed the following amounts: In New York county, four thousand dollars; in Kings county, four thousand dollars; in Erie county, three thousand dollars; in Westchester and Albany counties, twenty-five hundred dollars; in Nassau county, two thousand dollars; in Queens, Monroe and Onondaga counties, one thousand five hundred dollars; in Dutchess, Oneida, Orange, Rensselaer and Suffolk counties, one thousand dollars, and in Richmond county, five hundred dollars. Each of the said appraisers shall file with the state comptroller his oath of office and his official bond in the penal sum of not less than one thousand dollars, in the discretion of the state comptroller, conditioned for the faithful performance of his duties as such appraiser, which bond shall be approved by the attorney-general and the state comptroller. The state comptroller shall retain out of any funds in his hands on account of said tax the following amounts: First, a sum sufficient to provide the appraisers of New York county with five stenographers, four clerks and an examiner of values, of Kings county with two stenographers, and of Erie county with one clerk, appointed by the state comptroller, whose salary shall not exceed fifteen hundred dollars a year each. Second, a sum to be used in defraying the expenses for office rent, stationery, postage, process serving, et cetera, necessarily incurred in the appraisal of estates, not exceeding ten thousand five hundred dollars a year in New York county, and one thousand five hundred dollars a year in Kings county.

§ 232. **Appeal and other proceedings.**—The state comptroller or any person dissatisfied with the appraisalment or assessment and determination of tax may appeal therefrom to the surrogate within sixty days from the fixing, assessing and determination of tax by the surrogate as herein provided, upon filing in the office of the surrogate a written notice of appeal, which shall state the grounds upon which

the appeal is taken; but no costs shall be allowed by the surrogate on such appeal. Within two years after the entry of an order or decree of a surrogate determining the value of an estate and assessing the tax thereon, the state comptroller may, if he believes that such appraisal, assessment or determination has been fraudulently, collusively, or erroneously made, make application to a justice of the supreme court of the judicial district embracing the surrogate's court in which the order or decree has been filed, for a reappraisal thereof. The justice to whom such application is made may thereupon appoint a competent person to reappraise such estate. Such appraiser shall possess the powers and be subject to the duties of an appraiser under section two hundred and thirty and shall receive compensation at the rate of five dollars per day for every day actually and necessarily employed in such appraisal. Such compensation shall be payable by the state comptroller or county treasurer out of any funds he may have on account of any tax imposed under the provisions of this article, upon the certificate of the justice appointing him. The report of such appraiser shall be filed with the justice by whom he was appointed, and thereafter the same proceedings shall be taken and had by and before such justice as are herein provided to be taken and had by and before the surrogate. The determination and assessment of such justice shall supersede the determination and assessment of the surrogate, and shall be filed by such justice in the office of the state comptroller, and a certified copy thereof transmitted to the surrogate's court of the proper county.

§ 235. **Proceedings by district attorneys.**—If, after the expiration of eighteen months from the accrual of any tax under this article, such tax shall remain due and unpaid, after the refusal or neglect of the persons liable therefor to pay the same, the state comptroller shall notify the district attorney of the county, in writing, of such failure or neglect, and such district attorney shall apply to the surrogate's court for a citation, citing the persons liable to pay such tax to appear before the court on the day specified, not more than three months after the date of such citation, and show cause why the tax should not be paid. The surrogate, upon such application, and whenever it shall appear to him that any such tax accruing under this article has not been paid as required by law, shall issue such citation and the service of such citation, and the time, manner and proof thereof, and the hearing and determination thereon and the enforcement of the determination or order made by the surrogate shall conform to the provisions of the code of civil procedure for the service of citations out of the surrogate's court, and the hearing and determination thereon and its enforcement so far as the same may be applicable. The surrogate or his clerk shall, upon request of the district attorney or the state comptroller, furnish, without fee, one or more transcripts of such decree, which shall be docketed and filed by the county clerk of any

county of the state without fee, in the same manner and with the same effect as provided by law for filing and docketing transcripts of decrees of the surrogate's court. The cost awarded by any such decree after the collection and payment of the tax to the state comptroller or county treasurer may be retained by the district attorney for his own use. Such costs shall be fixed by the surrogate in his discretion, but shall not exceed in any case where there has not been a contest, the sum of one hundred dollars, or where there has been a contest the sum of two hundred and fifty dollars. Whenever the surrogate shall certify that there was probable cause for issuing a citation and taking the proceedings specified in this section, the state comptroller, after the same shall have been audited by him, shall pay all expenses incurred for the service of citations and other lawful disbursements not otherwise paid, from funds in his hands on account of such tax, or in a county in which the office of appraiser is not salaried, by a warrant upon the county treasurer of such county for the payment by him of the same from funds in his hands on account of such tax. In proceedings to which the state comptroller is cited as a party under sections two hundred and twenty-eight and two hundred and thirty of this article, he is authorized to designate and retain counsel to represent him to pay the expenses thereby incurred out of the funds which may be in his hands on account of this tax in any case in a county where the office of appraiser is salaried, and in any other county the state comptroller shall by warrant direct the county treasurer to pay such expenses out of any funds which may be in his hands on account of this tax; provided, however, that in the collection of taxes upon estates of nonresident decedents the state comptroller shall not allow for legal services up to and including the entry of the order of the surrogate fixing the tax a sum exceeding ten per centum of the taxes and penalties collected.

§ 237. **Fees of county treasurer.**—The treasurer of each county in which the office of appraiser is not salaried shall be allowed to retain on all taxes paid and accounted for by him each fiscal year under this article, five per centum on the first fifty thousand dollars, two and one-half per centum on the next fifty thousand dollars, and one per centum on all additional sums. Such fees shall be in addition to the salaries and fees now allowed by law to such officers.

Laws of 1909, Chap. 62, in effect February 17, 1909.**ARTICLE 10.****TAXABLE TRANSFERS.**

- Section 220. Taxable transfers.
221. Exceptions and limitations.
222. Accrual and payment of tax.
223. Discount and interest.
224. Lien of tax and collection by executors, administrators and trustees.
225. Refund of tax erroneously paid.
226. Taxes upon devises and bequests in lieu of commissions.
227. Liability of certain corporations to tax.
228. Jurisdiction of the surrogate.
229. Appointment of appraisers, stenographers and clerks.
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234. Surrogates' assistants in New York, Kings and other counties.
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236. Receipts from county treasurer or comptroller.
237. Fees of county treasurer.
238. Books and forms to be furnished by the state comptroller.
239. Reports of surrogate and county clerk.
240. Reports of county treasurer.
241. Report of state comptroller; payment of taxes.
242. Application of taxes.
243. Definitions.
244. Exemptions in article one not applicable.
245. Limitation of time.

§ 220. **Taxable transfers.** A tax shall be and is hereby imposed upon the transfer of any property, real or personal, of the value of five hundred dollars or over, or of any interest

therein or income therefrom, in trust or otherwise, to persons or corporations not exempt by law from taxation on real or personal property, in the following cases:

1. When the transfer is by will or by the intestate laws of this state from any person dying seized or possessed of the property while a resident of the state.

2. When the transfer is by will or intestate law, of property within the state, and the decedent was a nonresident of the state at the time of his death.

3. Whenever the property of a resident decedent, or the property of a nonresident decedent within this state, transferred by will, is not specifically bequeathed or devised, such property shall, for the purposes of this article, be deemed to be transferred proportionately to, and divided pro rata among all the general legatees and devisees named in said decedent's will, including all transfers under a residuary clause of such will.

4. When the transfer is of property made by a resident or by a nonresident when such nonresident's property is within this state, by deed, grant, bargain, sale or gift made in contemplation of the death of the grantor, vendor or donor, or intended to take effect in possession or enjoyment at or after such death.

5. When any such person or corporation becomes beneficially entitled, in possession or expectancy, to any property or the income thereof by any such transfer, whether made before or after the passage of this chapter.

6. Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property made either before or after the passage of this chapter, such appointment when made shall be deemed a transfer taxable under the provisions of this chapter in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will; and whenever any person or corporation possessing such a power of appointment so derived shall omit or fail to exercise the same within the time provided therefor, in whole or in part, a transfer taxable under the provisions of this chapter shall be deemed to take place to the extent of such omission or failure, in the same manner as though the persons or corporations thereby becoming entitled to the possession or enjoyment of the property to which such power related had succeeded thereto by a will of the donee of the power failing

to exercise such power, taking effect at the time of such omission or failure.

7. The tax imposed hereby shall be at the rate of five per centum upon the clear market value of such property, except as otherwise prescribed in the next section.

§ 221. **Exceptions and limitations.**—When property, real or personal, or any beneficial interest therein, of the value of less than ten thousand dollars, passes by any such transfer to or for the use of any father, mother, husband, wife, child, brother, sister, wife or widow of a son or the husband of a daughter, or any child or children adopted as such in conformity with the laws of this state, of the decedent, grantor, donor or vendor, or to any child to whom any such decedent, grantor, donor or vendor for not less than ten years prior to such transfer stood in the mutually acknowledged relation of a parent, provided, however, such relationship began at or before the child's fifteenth birthday, and was continuous for said ten years thereafter, and provided also that, except in the case of a stepchild, the parents of such child shall have been deceased when such relationship commenced, or to any lineal descendant of such decedent, grantor, donor or vendor born in lawful wedlock, such transfer of property shall not be taxable under this article; if real or personal property, or any beneficial interest therein, so transferred is of the value of ten thousand dollars or more, it shall be taxable under this article at the rate of one per centum upon the clear market value of such property. But any property devised or bequeathed to any person who is a bishop or to any religious, educational, charitable, missionary, benevolent, hospital or infirmary corporation, including corporations organized exclusively for bible or tract purposes, shall be exempted from and not subject to the provisions of this article. There shall also be exempted from and not subject to the provisions of this article personal property other than money or securities bequeathed to a corporation or association organized exclusively for the moral or mental improvement of men or women or for scientific, literary, library, patriotic, cemetery or historical purposes or for the enforcement of laws relating to children or animals or for two or more of such purposes and used exclusively for carrying out one or more of such purposes. But no such corporation or association shall be entitled to such exemption if any officer, member or employee thereof shall receive or may be lawfully entitled to receive any pecuniary

profit from the operations thereof except reasonable compensation for services in effecting one or more of such purposes or as proper beneficiaries of its strictly charitable purposes; or if the organization thereof for any such avowed purpose be a guise or pretense for directly or indirectly making any other pecuniary profit for such corporation or association or for any of its members or employees or if it be not in good faith organized or conducted exclusively for one or more of such purposes.

§ 222. **Accrual and payment of tax.**—All taxes imposed by this article shall be due and payable at the time of the transfer, except as herein otherwise provided. Taxes upon the transfer of any estate, property or interest therein limited, conditioned, dependent or determinable upon the happening of any contingency or future event by reason of which the fair market value thereof can not be ascertained at the time of the transfer as herein provided, shall accrue and become due and payable when the persons or corporations beneficially entitled thereto shall come into actual possession or enjoyment thereof. Such tax shall be paid to the state comptroller in a county in which the office of appraiser is salaried, and in other counties, to the county treasurer, and said state comptroller or county treasurer shall give, and every executor, administrator or trustee shall take, duplicate receipts from him of such payment as provided in section two hundred and thirty-six.

§ 223. **Discount and interest.**—If such tax is paid within six months from the accrual thereof, a discount of five per centum shall be allowed and deducted therefrom. If such tax is not paid within eighteen months from the accrual thereof, interest shall be charged and collected thereon at the rate of ten per centum per annum from the time the tax accrued; unless by reason of claims made upon the estate, necessary litigation or other unavoidable cause of delay, such tax can not be determined and paid as herein provided, in which case interest at the rate of six per centum per annum shall be charged upon such tax from the accrual thereof until the cause of such delay is removed, after which ten per centum shall be charged.

§ 224. **Lien of tax and collection by executors, administrators and trustees.**—Every such tax shall be and remain a lien upon the property transferred until paid and the person to whom the property is so transferred, and the executors, administrators and trustees of every estate so transferred shall

be personally liable for such tax until its payment. Every executor, administrator or trustee shall have full power to sell so much of the property of the decedent as will enable him to pay such tax in the same manner as he might be entitled by law to do for the payment of the debts of the testator or intestate. Any such executor, administrator or trustee having in charge or in trust any legacy or property for distribution subject to such tax shall deduct the tax therefrom and shall pay over the same to the state comptroller or county treasurer, as herein provided. If such legacy or property be not in money, he shall collect the tax thereon upon the appraised value thereof from the person entitled thereto. He shall not deliver or be compelled to deliver any specific legacy or property subject to tax under this article to any person until he shall have collected the tax thereon. If any such legacy shall be charged upon or payable out of real property, the heir or devisee shall deduct such tax therefrom and pay it to the executor, administrator or trustee, and the tax shall remain a lien or charge on such real property until paid; and the payment thereof shall be enforced by the executor, administrator or trustee in the same manner that payment of the legacy might be enforced, or by the district attorney under section two hundred and thirty-five of this chapter. If any such legacy shall be given in money to any such person for a limited period, the executor, administrator or trustee shall retain the tax upon the whole amount, but if it be not in money, he shall make application to the court having jurisdiction of an accounting by him, to make an apportionment, if the case require it, of the sum to be paid into his hands by such legatees, and for such further order relative thereto as the case may require.

§ 225. **Refund of tax erroneously paid.**—If any debts shall be proven against the estate of a decedent after the payment of any legacy or distributive share thereof, from which any such tax has been deducted or upon which it has been paid by the person entitled to such legacy or distributive share, and such person is required by order of the surrogate having jurisdiction, on notice to the state comptroller, to refund the amount of such debts or any part thereof, an equitable proportion of the tax shall be repaid to him by the executor, administrator or trustee, if the tax has not been paid to the state comptroller or county treasurer; or if such tax has been paid to such state comptroller or county treasurer, such officer shall refund out of

the funds in his hands or custody to the credit of such taxes such equitable proportion of the tax, and credit himself with the same in the account required to be rendered by him under this article. If after the payment of any tax in pursuance of an order fixing such tax, made by the surrogate having jurisdiction, such order be modified or reversed within two years from and after the date of entry of the order fixing the tax, on due notice to the state comptroller, the state comptroller shall, if such tax was paid in a county in which the office of appraiser is salaried, refund to the executor, administrator, trustee, person or persons by whom such tax was paid, the amount of any moneys paid or deposited on account of such tax in excess of the amount of the tax fixed by the order modified or reversed, out of the funds in his hands or custody to the credit of such taxes, and to credit himself with the same in the account required to be rendered by him under this article, or if paid in a county in which the office of appraiser is not salaried, he shall by warrant direct and allow the county treasurer of the county to refund such amount in the same manner; but no application for such refund shall be made after one year from such reversal or modification, and the representatives of the estate, legatees, devisees or distributees entitled to any refund under this section shall not be entitled to any interest upon such refund, and the state comptroller shall deduct from the fees allowed by this article to the county treasurer the amount theretofore allowed him upon such overpayment. Where it shall be proved to the satisfaction of the surrogate that deductions for debts were allowed upon the appraisal, since proved to have been erroneously allowed, it shall be lawful for such surrogate to enter an order assessing the tax upon the amount wrongfully or erroneously deducted.

§ 226. **Taxes upon devises and bequests in lieu of commissions.**—If a testator bequeaths or devises property to one or more executors or trustees in lieu of their commissions or allowances, or makes them his legatees to an amount exceeding the commissions or allowances prescribed by law for an executor or trustee, the excess in value of the property so bequeathed or devised above the amount of commissions or allowances prescribed by law in similar cases shall be taxable under this article.

§ 227. **Liability of certain corporations to tax.**—If a foreign executor, administrator or trustee shall assign or transfer any stock or obligations in this state standing in the name of a

decedent, or in trust for a decedent, liable to any such tax, the tax shall be paid to the state comptroller or the treasurer of the proper county on the transfer thereof. No safe deposit company, trust company, corporation, bank or other institution, person or persons having in possession or under control securities, deposits, or other assets belonging to or standing in the name of a decedent who was a resident or nonresident, or belonging to, or standing in the joint names of such a decedent and one or more persons, including the shares of the capital stock of, or other interests in, the safe deposit company, trust company, corporation, bank or other institution making the delivery or transfer herein provided, shall deliver or transfer the same to the executors, administrators or legal representatives of said decedent, or to the survivor or survivors when held in the joint names of a decedent and one or more persons, or upon their order or request, unless notice of the time and place of such intended delivery or transfer be served upon the state comptroller at least ten days prior to said delivery or transfer; nor shall any such safe deposit company, trust company, corporation, bank or other institution, person or persons deliver or transfer any securities, deposits or other assets belonging to or standing in the name of a decedent, or belonging to, or standing in the joint names of a decedent and one or more persons, including the shares of the capital stock of, or other interests in, the safe deposit company, trust company, corporation, bank or other institution making the delivery or transfer, without retaining a sufficient portion or amount thereof to pay any tax and interest which may thereafter be assessed on account of the delivery or transfer of such securities, deposits or other assets, including the shares of the capital stock of, or other interests in, the safe deposit company, trust company, corporation, bank or other institution making the delivery or transfer, under the provisions of this article, unless the state comptroller consents thereto in writing. And it shall be lawful for the said state comptroller, personally or by representative, to examine said securities, deposits or assets at the time of such delivery or transfer. Failure to serve such notice or failure to allow such examination or failure to retain a sufficient portion or amount to pay such tax and interest as herein provided shall render said safe deposit company, trust company, corporation, bank or other institution, person or persons liable to the payment of the amount of the tax and interest due or thereafter to become

due upon said securities, deposits or other assets, including the shares of the capital stock of, or other interests in, the safe deposit company, trust company, corporation, bank or other institution making the delivery or transfer, and in addition thereto, a penalty of not less than five or more than twenty-five thousand dollars; and the payment of such tax and interest thereon, or of the penalty above prescribed, or both, may be enforced in an action brought by the state comptroller in any court of competent jurisdiction.

§ 228. **Jurisdiction of the surrogate.**—The surrogate's court of every county of the state having jurisdiction to grant letters testamentary or of administration upon the estate of a decedent whose property is chargeable with any tax under this article, or to appoint a trustee of such estate or any part thereof, or to give ancillary letters thereon, shall have jurisdiction to hear and determine all questions arising under the provisions of this article, and to do any act in relation thereto authorized by law to be done by a surrogate in other matters or proceedings coming within his jurisdiction; and if two or more surrogates' courts shall be entitled to exercise any such jurisdiction, the surrogate first acquiring jurisdiction hereunder shall retain the same to the exclusion of every other surrogate. Every petition for ancillary letters testamentary or ancillary letters of administration made in pursuance of the provisions of article seven, title three, chapter eighteen of the code of civil procedure shall set forth the name of the state comptroller as a person to be cited as therein prescribed, and a true and correct statement of all the decedent's property in this state and the value thereof; and upon the presentation thereof the surrogate shall issue a citation directed to the state comptroller; and upon the return of the citation the surrogate shall determine the amount of the tax which may be or become due under the provisions of this article and his decree awarding the letters may contain any provision for the payment of such tax or the giving of security therefor which might be made by such surrogate if the state comptroller were a creditor of the decedent.

§ 229. **Appointment of appraisers, stenographers and clerks.**—The state comptroller shall appoint and may at pleasure remove not to exceed six persons in the county of New York; three persons in the county of Kings, and one person in the counties of Albany, Dutchess, Erie, Monroe, Nassau, Oneida, Onondaga, Orange, Queens, Rensselaer, Richmond, Suffolk,

and Westchester, to act as appraisers therein. The appraisers so appointed shall receive an annual salary to be fixed by the state comptroller, together with their actual and necessary traveling expenses and witness fees, as hereinafter provided, payable monthly by the state comptroller out of any funds in his hands or custody on account of transfer tax. The salaries of each of the appraisers so appointed shall not exceed the following amounts: In New York county, four thousand dollars; in Kings county, four thousand dollars; in Erie county, three thousand dollars; in Westchester and Albany counties, twenty-five hundred dollars; in Nassau county, two thousand dollars; in Queens, Monroe and Onondaga counties, one thousand five hundred dollars; in Dutchess, Oneida, Orange, Rensselaer, Richmond and Suffolk counties, one thousand dollars. Each of the said appraisers shall file with the state comptroller his oath of office and his official bond in the penal sum of not less than one thousand dollars, in the discretion of the state comptroller, conditioned for the faithful performance of his duties as such appraiser, which bond shall be approved by the attorney-general and the state comptroller. The state comptroller shall retain out of any funds in his hands on account of said tax the following amounts: First, a sum sufficient to provide the appraisers of New York County with six stenographers, three clerks and an examiner of values, of Kings county with three stenographers, and of Erie county with one clerk, appointed by the state comptroller, whose salary shall not exceed fifteen hundred dollars a year each. Second, a sum to be used in defraying the expenses for office rent, stationery, postage, process serving and other similar expenses necessarily incurred in the appraisal of estates, not exceeding ten thousand five hundred dollars a year in New York county, and three thousand dollars a year in Kings county. (*Thus amended by L. 1909, ch. 283, in effect May 4, 1909.*)

§ 230. **Proceedings by appraiser.**—In each county in which the office of appraiser is not salaried the county treasurer shall act as appraiser. The surrogate, either upon his own motion, or upon the application of any interested person, including the state comptroller, shall by order direct the person or one of the persons appointed pursuant to section two hundred and twenty-nine of this article in counties in which the office of appraiser is salaried, and in other counties, the county treasurer, to fix the fair market value of property of persons whose estates

shall be subject to the payment of any tax imposed by this article.

Every such appraiser shall forthwith give notice by mail to all persons known to have a claim or interest in the property to be appraised, including the state comptroller, and to such persons as the surrogate may by order direct, of the time and place when he will appraise such property. He shall at such time and place appraise the same at its fair market value as herein prescribed; and for that purpose the said appraiser is authorized to issue subpoenas and to compel the attendance of witnesses before him and to take the evidence of such witnesses under oath concerning such property and the value thereof; and he shall make report thereof and of such value in writing, to the said surrogate, together with the depositions of the witnesses examined, and such other facts in relation thereto and to said matter as the surrogate may order or require. Every appraiser, except in the counties in which the office of appraiser is salaried, for which provision is hereinbefore made, shall be paid by the state comptroller and after the audit of said state comptroller, his actual and necessary traveling expenses and the fees paid such witnesses, which fees shall be the same as those now paid to witnesses subpoenaed to attend in courts of record, payment to be made out of funds in the hands of the county treasurer of the proper county on account of the tax imposed under the provisions of this article.

The value of every future or limited estate, income, interest or annuity dependent upon any life or lives in being, shall be determined by the rule, method and standard of mortality and value employed by the superintendent of insurance in ascertaining the value of policies of life insurance and annuities for the determination of liabilities of life insurance companies, except that the rate of interest for making such computation shall be five per centum per annum.

In estimating the value of any estate or interest in property, to the beneficial enjoyment or possession whereof there are persons or corporations presently entitled thereto, no allowance shall be made on account of any contingent incumbrance thereon, nor on account of any contingency upon the happening of which the estate or property or some part thereof or interest therein might be abridged, defeated or diminished; provided, however, that in the event of such incumbrance taking effect as an actual burden upon the interest of the beneficiary, or in the event

of the abridgment, defeat or diminution of said estate or property or interest therein as aforesaid, a return shall be made to the person properly entitled thereto of a proportionate amount of such tax on account of the incumbrance when taking effect, or so much as will reduce the same to the amount which would have been assessed on account of the actual duration or extent of the estate or interest enjoyed. Such return of tax shall be made in the manner provided by section two hundred and twenty-five of this article.

Where any property shall, after the passage of this chapter, be transferred subject to any charge, estate or interest, determinable by the death of any person, or at any period ascertainable only by reference to death, the increase accruing to any person or corporation upon the extinction or determination of such charge, estate or interest, shall be deemed a transfer of property taxable under the provisions of this article in the same manner as though the person or corporation beneficially entitled thereto had then acquired such increase from the person from whom the title to their respective estates or interests is derived.

When property is transferred in trust or otherwise, and the rights, interest or estates of the transferees are dependent upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended or abridged, a tax shall be imposed upon said transfer at the highest rate which, on the happening of any of the said contingencies or conditions, would be possible under the provisions of this article, and such tax so imposed shall be due and payable forthwith by the executors or trustees out of the property transferred; provided, however, that on the happening of any contingency whereby the said property, or any part thereof, is transferred to a person or corporation exempt from taxation under the provisions of this article, or to any person taxable at a rate less than the rate imposed and paid, such person or corporation shall be entitled to a return of so much of the tax imposed and paid as is the difference between the amount paid and the amount which said person or corporation should pay under the provisions of this article, with interest thereon at the rate of three per centum per annum from the time of payment. Such return of overpayment shall be made in the manner provided by section two hundred and twenty-five of this article.

Estates in expectancy which are contingent or defeasible and

in which proceedings for the determination of the tax have not been taken or where the taxation thereof has been held in abeyance, shall be appraised at their full, undiminished value when the persons entitled thereto shall come into the beneficial enjoyment or possession thereof, without diminution for or on account of any valuation theretofore made of the particular estates for purposes of taxation, upon which said estates in expectancy may have been limited.

Where an estate for life or for years can be divested by the act or omission of the legatee or devisee it shall be taxed as if there were no possibility of such divesting.

The report of the appraiser shall be made in duplicate, one of which duplicates shall be filed in the office of the surrogate and the other in the office of the state comptroller.

§ 231. **Determination of surrogate.**—From such report of appraisal and other proof relating to any such estate before the surrogate, the surrogate shall forthwith, as of course, determine the cash value of all estates and the amount of tax to which the same are liable; or the surrogate may so determine the cash value of all such estates and the amount of tax to which the same are liable, without appointing an appraiser.

The superintendent of insurance shall, on the application of any surrogate, determine the value of any such future or contingent estates, income or interest therein limited, contingent, dependent or determinable upon the life or lives of persons in being, upon the facts contained in any such appraiser's report, and certify the same to the surrogate, and his certificate shall be conclusive evidence that the method of computation adopted therein is correct.

The surrogate shall immediately give notice, upon the determination by him as to the value of any estate which is taxable under this article, and of the tax to which it is liable, to all persons known to be interested therein, and shall immediately forward a copy of such taxing order to the state comptroller. The surrogate shall also forward to the state comptroller copies of all orders entered by him in relation to or affecting in any way the transfer tax on any estate, including orders of exemption.

If, however, it appear at any stage of the proceedings that any of such persons known to be interested in the estate is an infant or an incompetent, the surrogate may, if the interest of such infant or incompetent is presently involved and is adverse

to that of any of the other persons interested therein, appoint a special guardian of such infant; but nothing in this provision shall affect the right of an infant over fourteen years of age or of any one on behalf of an infant under fourteen years of age to nominate and apply for the appointment of a special guardian for such infant at any stage of the proceedings.

§ 232. **Appeal and other proceedings.**—The state comptroller or any person dissatisfied with the appraisement or assessment and determination of tax may appeal therefrom to the surrogate within sixty days from the fixing, assessing and determination of tax by the surrogate as herein provided, upon filing in the office of the surrogate a written notice of appeal, which shall state the grounds upon which the appeal is taken; but no costs shall be allowed by the surrogate on such appeal.

Within two years after the entry of an order or decree of a surrogate determining the value of an estate and assessing the tax thereon, the state comptroller may, if he believes that such appraisal, assessment or determination has been fraudulently, collusively or erroneously made, make application to a justice of the supreme court of the judicial district embracing the surrogate's court in which the order or decree has been filed, for a reappraisal thereof. The justice to whom such application is made may thereupon appoint a competent person to reappraise such estate. Such appraiser shall possess the powers and be subject to the duties of an appraiser under section two hundred and thirty and shall receive compensation at the rate of five dollars per day for every day actually and necessarily employed in such appraisal. Such compensation shall be payable by the state comptroller or county treasurer out of any funds he may have on account of any tax imposed under the provisions of this article, upon the certificate of the justice appointing him. The report of such appraiser shall be filed with the justice by whom he was appointed, and thereafter the same proceedings shall be taken and had by and before such justice as are herein provided to be taken and had by and before the surrogate. The determination and assessment of such justice shall supersede the determination and assessment of the surrogate, and shall be filed by such justice in the office of the state comptroller, and a certified copy thereof transmitted to the surrogate's court of the proper county.

§ 233. **Composition of transfer tax upon certain estates.**—The state comptroller, by and with the consent of the attorney-

general expressed in writing, is hereby empowered and authorized to enter into an agreement with the trustees of any estate in which remainders or expectant estates have been of such a nature, or so disposed and circumstanced, that the taxes therein were held not presently payable, or where the interests of the legatees or devisees were not ascertainable under the provisions of chapter four hundred and eighty-three of the laws of eighteen hundred and eighty-five; chapter three hundred and ninety-nine of the laws of eighteen hundred and ninety-two, or chapter nine hundred and eight of the laws of eighteen hundred and ninety-six, and the several acts amendatory thereof and supplemental thereto; and to compound such taxes upon such terms as may be deemed equitable and expedient; and to grant discharge to said trustees upon the payment of the taxes provided for in such composition, provided, however, that no such composition shall be conclusive in favor of said trustees as against the interest of such cestuis que trust as may possess either present rights of enjoyment, or fixed, absolute or indefeasible rights of future enjoyment, or of such as would possess such rights in the event of the immediate termination of particular estates, unless they consent thereto, either personally, when competent, or by guardian or committee. Composition or settlement made or effected under the provisions of this section shall be executed in triplicate, and one copy filed in the office of the state comptroller, one copy in the office of the surrogate of the county in which the tax was paid, and one copy delivered to the executors, administrators or trustees who shall be parties thereto.

§ 234. Surrogates' assistants in New York, Kings and other counties.—The state comptroller may, upon the recommendation of the surrogate, appoint, and may at pleasure remove, assistants and clerks in the surrogate's offices of the following counties, at annual salaries to be fixed by him not to exceed the amounts hereinafter specified:

1. In New York county, a transfer tax assistant, four thousand dollars; a transfer tax clerk, two thousand four hundred dollars; an assistant clerk, eighteen hundred dollars; a recording clerk, thirteen hundred dollars; a stenographer, eight hundred dollars; and shall be entitled to expend not more than seven hundred and fifty dollars a year in such office for expenses necessarily incurred in the assessment and collection of taxes under this article.

2. In Kings county, a transfer tax assistant, four thousand dollars; a transfer tax clerk, two thousand dollars; an assistant clerk, fifteen hundred dollars; and shall be entitled to expend not more than five hundred dollars a year for expenses necessarily incurred in the assessment and collection of taxes under this article.

3. In Erie county, a transfer tax clerk, eighteen hundred dollars.

4. In Westchester county, a transfer tax assistant, two thousand five hundred dollars.

5. In Albany county, a transfer tax clerk, one thousand dollars.

6. In Queens county, a transfer tax clerk, one thousand dollars.

7. In Onondaga county, a transfer tax clerk, twelve hundred dollars.

8. In Monroe county, two transfer tax clerks, seven hundred and fifty dollars each; and shall be entitled to expend not more than two hundred dollars a year for expenses necessarily incurred in the assessment and collection of taxes under this article.

9. In Dutchess county, a transfer tax clerk, nine hundred dollars.

10. In Oneida county, not more than two transfer tax clerks, twelve hundred dollars in the aggregate.

11. In Suffolk county, a transfer tax clerk, one thousand dollars.

12. In Ulster county, a transfer tax clerk, seven hundred and twenty dollars.

Such salaries and expenses shall be paid monthly by the state comptroller, upon proper vouchers, out of any funds in his hands on account of taxes collected under this article.

§ 235. **Proceedings by district attorneys.**—If, after the expiration of eighteen months from the accrual of any tax under this article, such tax shall remain due and unpaid, after the refusal or neglect of the persons liable therefor to pay the same, the state comptroller shall notify the district attorney of the county, in writing, of such failure or neglect, and such district attorney shall apply to the surrogate's court for a citation, citing the persons liable to pay such tax to appear before the court on the day specified, not more than three months after the date of such citation, and show cause why the tax should not be paid. The surrogate, upon such application, and when-

ever it shall appear to him that any such tax accruing under this article has not been paid as required by law, shall issue such citation, and the service of such citation, and the time, manner and proof thereof, and the hearing and determination thereon and the enforcement of the determination or order made by the surrogate shall conform to the provisions of the code of civil procedure for the service of citations out of the surrogate's court, and the hearing and determination thereon and its enforcement so far as the same may be applicable. The surrogate or his clerk shall, upon request of the district attorney or the state comptroller, furnish, without fee, one or more transcripts of such decree, which shall be docketed and filed by the county clerk of any county of the state without fee, in the same manner and with the same effect as provided by law for filing and docketing transcripts of decrees of the surrogate's court. The costs awarded by any such decree after the collection and payment of the tax to the state comptroller or county treasurer may be retained by the district attorney for his own use. Such costs shall be fixed by the surrogate in his discretion, but shall not exceed in any case where there has not been a contest, the sum of one hundred dollars, or where there has been a contest, the sum of two hundred and fifty dollars. Whenever the surrogate shall certify that there was probable cause for issuing a citation and taking the proceedings specified in this section, the state comptroller, after the same shall have been audited by him, shall pay all expenses incurred for the service of citations and other lawful disbursements not otherwise paid, from funds in his hands on account of such tax, or in a county in which the office of appraiser is not salaried, by a warrant upon the county treasurer of such county for the payment by him of the same from funds in his hands on account of such tax. In proceedings to which the state comptroller is cited as a party under sections two hundred and twenty-eight and two hundred and thirty of this article, he is authorized to designate and retain counsel to represent him and to pay the expenses thereby incurred out of the funds which may be in his hands on account of this tax in any case in a county where the office of appraiser is salaried, and in any other county the state comptroller shall by warrant direct the county treasurer to pay such expenses out of any funds which may be in his hands on account of this tax; provided, however, that in the collection of taxes upon estates of nonresident decedents the state comptroller shall not allow for

legal services up to and including the entry of the order of the surrogate fixing the tax a sum exceeding ten per centum of the taxes and penalties collected.

§ 236. **Receipts from county treasurer or comptroller.**—One of the duplicate receipts issued for the payment of any tax under this article, as provided by section two hundred and twenty-two, shall be countersigned by the state treasurer if the same was issued by the state comptroller, and by the state comptroller if issued by any county treasurer. The officer so countersigning the same shall charge the officer receiving the tax with the amount thereof and affix the seal of his office to the same and return to the proper person; but no executor, administrator or trustee shall be entitled to a final accounting of an estate in settlement of which a tax is due under the provisions of this article unless he shall produce a receipt so sealed and countersigned, or a certified copy thereof. Any person shall, upon the payment of fifty cents to the officer issuing such receipt, be entitled to a duplicate thereof, to be signed, sealed and countersigned in the same manner as the original.

Any person shall, upon the payment of fifty cents, be entitled to a certificate of the state comptroller that the tax upon the transfer of any real estate of which any decedent died seized has been paid, such certificate to designate the real property upon which such tax is paid, the name of the person so paying the same, and whether in full of such tax. Such certificate may be recorded in the office of the county clerk or register of the county where such real property is situate, in a book to be kept by him for that purpose, which shall be labeled "transfer tax."

§ 237. **Fees of county treasurer.**—The treasurer of each county in which the office of appraiser is not salaried shall be allowed to retain, on all taxes paid and accounted for by him each fiscal year under this article, five per centum on the first fifty thousand dollars, two and one-half per centum on the next fifty thousand dollars, and one per centum on all additional sums. Such fees shall be in addition to the salaries and fees now allowed by law to such officers.

§ 238. **Books and forms to be furnished by the state comptroller.**—The state comptroller shall furnish to each surrogate a book, which shall be a public record, and in which he shall enter the name of every decedent upon whose estate an application to him has been made for the issue of letters of administration, or letters testamentary, or ancillary letters, the date and

place of death of such decedent, the estimated value of his real and personal property, the names, places of residence and relationship to him of his heirs-at-law, the names and places of residence of the legatees and devisees in any will of any such decedent, the amount of each legacy and the estimated value of any real property devised therein, and to whom devised. These entries shall be made from the data contained in the papers filed on any such application, or in any proceeding relating to the estate of the decedent. The surrogate shall also enter in such book the amount of the personal property of any such decedent, as shown by the inventory thereof when made and filed in his office, and the returns made by any appraiser appointed by him under this article, and the value of annuities, life estates, terms of years, and other property of any such decedent or given by him in his will or otherwise, as fixed by the surrogate, and the tax assessed thereon, and the amounts of any receipts for payment of any tax on the estate of such decedent under this article filed with him. The state comptroller shall also furnish to each surrogate forms for the reports to be made by such surrogate, which shall correspond with the entries to be made in such book.

§ 239. **Reports of surrogate and county clerk.**—Each surrogate shall, on January, April, July and October first of each year, make a report, upon the forms furnished by the comptroller containing all the data and matters required to be entered in such book, which shall be immediately forwarded to the state comptroller. The county clerk of each county, except in the counties where the registers perform the duties of the county clerk with respect to the recording of deeds, and when in such counties the registers, shall, at the same times, make reports containing a statement of any deed or other conveyance filed or recorded in his office, of any property, which appears to have been made or intended to take effect in possession or enjoyment after the death of the grantor or vendor, with the name and place of residence of such grantor or vendor, the name and place of residence of the grantee or vendee, and a description of the property transferred, which shall be immediately forwarded to the state comptroller.

§ 240. **Reports of county treasurer.**—Each county treasurer in a county in which the office of appraiser is not salaried shall make a report, under oath, to the state comptroller, on January, April, July and October first of each year, of all taxes

received by him under this article, stating for what estate and by whom and when paid. The form of such report may be prescribed by the state comptroller. He shall, at the same time, pay the state treasurer all taxes received by him under this article and not previously paid into the state treasury, and for all such taxes collected by him and not paid into the state treasury within thirty days from the times herein required, he shall pay interest at the rate of ten per centum per annum.

§ 241. **Report of state comptroller; payment of taxes.**—The state comptroller shall deposit all taxes collected by him under this article in a responsible bank, banking house or trust company in the city of Albany, which shall pay the highest rate of interest to the state for such deposit, to the credit of the state comptroller on account of the transfer tax. And every such bank, banking house or trust company shall execute and file in his office an undertaking to the state, in the sum, and with such sureties, as are required and approved by the comptroller, for the safe keeping and prompt payment on legal demand therefor of all such moneys held by or on deposit in such bank, banking house or trust company, with interest thereon on daily balances at such rate as the comptroller may fix. Every such undertaking shall have indorsed thereon, or annexed thereto, the approval of the attorney-general as to its form. The state comptroller shall on the first day of each month make a verified return to the state treasurer of all taxes received by him under this article, stating for what estate, and by whom and when paid; and shall credit himself with all expenditures made since his last previous return on account of such taxes, for salary, refunds or other purposes lawfully chargeable thereto. He shall on or before the tenth day of each month pay to the state treasurer the balance of such taxes remaining in his hands at the close of business on the last day of the previous month, as appears from such returns.

§ 242. **Application of taxes.**—All taxes levied and collected under this article when paid into the treasury of the state shall be applicable to the expenses of the state government and to such other purposes as the legislature shall by law direct.

§ 243. **Definitions.**—The words "estate" and "property," as used in this article, shall be taken to mean the property or interest therein of the testator, intestate, grantor, bargainor or vendor, passing or transferred to those not herein specifically exempted from the provisions of this article, and not as the

property or interest therein passing or transferred to individual legatees, devisees, heirs, next of kin, grantees, donees or vendees, and shall include all property or interest therein, whether situated within or without this state. The word "transfer," as used in this article, shall be taken to include the passing of property or any interest therein in possession or enjoyment, present or future, by inheritance, descent, devise, bequest, grant, deed, bargain, sale or gift, in the manner herein prescribed. The words "county treasurer" and "district attorney," as used in this article, shall be taken to mean the treasurer or the district attorney of the county of the surrogate having jurisdiction as provided in section two hundred and twenty-eight of this article.

§ 244. **Exemptions in article one not applicable.**—The exemptions enumerated in section four of this chapter shall not be construed as being applicable in any manner to the provisions of this article.

§ 245. **Limitation of time.**—The provisions of the code of civil procedure relative to the limitation of time of enforcing a civil remedy shall not apply to any proceeding or action taken to levy, appraise, assess, determine or enforce the collection of any tax or penalty prescribed by this article, and this section shall be construed as having been in effect as of date of the original enactment of the inheritance tax law, provided, however, that as to real estate in the hands of bona fide purchasers, the transfer tax shall be presumed to be paid and cease to be a lien as against such purchasers after the expiration of six years from the date of accrual.

Amendment by Laws 1910, Chap. 600,

In effect June 23, 1911, amended section **221**, by adding the words "for religious ceremonies, observances or commemorative services of or for the deceased donor, or" to the second sentence of section 221 between the words "devised or bequeathed," and the words "to any person" in said sentence. Vide *post*, page 521.

Amendment by Laws of 1910, Chap. 706,

In effect July 11, 1910,^a amended sections **220, 221, 229** and **243**,
to-wit:

L. 1909,
ch. 62,
§ 220
amended. Section 1. Section two hundred and twenty of chapter
sixty-two of the laws of nineteen hundred and nine, en-
titled "An act in relation to taxation, constituting chapter
sixty of the consolidated laws," is hereby amended to
read respectively as follows:

§ 220. **Taxable transfers.** A tax shall be and is hereby imposed upon the transfer of any property, real or personal of the value of more than one hundred dollars ¹ or of any interest therein or income therefrom, in trust or otherwise, to persons or corporations not exempt by law from taxation on real or personal property, in the following cases:

1. When the transfer is by will or by the intestate laws of this state from any person dying seized or possessed of the property while a resident of the state.

2. When the transfer is by will or intestate law, of property within the state, and the decedent was a nonresident of the state at the time of his death.

3. Whenever the property of a resident decedent, or the property of a nonresident decedent within this state, transferred by will, is not specifically bequeathed or devised, such property shall, for the purposes of this article, be deemed to be transferred proportionately to, and divided pro rata among all the general legatees and devisees named in said decedent's will, including all transfers under a residuary clause of such will.

4. When the transfer is of property made by a resident or by a nonresident when such nonresident's property is within this state, by deed, grant, bargain, sale or gift made in contemplation of the death of the grantor, vendor or donor, or intended to take effect in possession or enjoyment at or after such death.

5. When any such person or corporation becomes beneficially entitled, in possession or expectancy, to any property or the income thereof by any such transfer, whether made before or after the passage of this chapter.

6. Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property made either before or after the passage of this chapter, such appointment when made shall be deemed a transfer taxable under the provisions of this chapter in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power

^a Vide discussion in Matter of Lane, 157 App. Div. 694-697, *post*, page 809.

¹ Formerly "five hundred dollars or over."

and had been bequeathed or devised by such donee by will; and whenever any person or corporation possessing such a power of appointment so derived shall omit or fail to exercise the same within the time provided therefor, in whole or in part, a transfer taxable under the provisions of this chapter shall be deemed to take place to the extent of such omission or failure, in the same manner as though the persons or corporations thereby becoming entitled to the possession or enjoyment of the property to which such power related had succeeded thereto by a will of the donee of the power failing to exercise such power, taking effect at the time of such omission or failure.

7. The tax imposed hereby shall be at the rate of five per centum upon the clear market value of such property, except as otherwise prescribed in the next section.

§ 2. Section two hundred and twenty-one of such chapter, as amended by chapter six hundred of the laws of nineteen hundred and ten, is hereby amended to read as follows: § 221, as amended by L. 1910, ch. 600, further amended.

§ 221. **Exceptions and limitations.** When property, real or personal, or any beneficial interest therein, of the value of not more than five hundred dollars,¹ passes by any such transfer to or for the use of any father, mother, husband, wife, child, brother, sister, wife or widow of a son or the husband of a daughter, or any child or children adopted as such in conformity with the laws of this state, of the decedent, grantor, donor or vendor, or to any child to whom any such decedent, grantor, donor or vendor for not less than ten years prior to such transfer stood in the mutually acknowledged relation of a parent, provided, however, such relationship began at or before the child's fifteenth birthday, and was continuous for said ten years thereafter, and provided also that, except in the case of a stepchild, the parents of such child shall have been deceased when such relationship commenced, or to any lineal descendant of such decedent, grantor, donor or vendor born in lawful wedlock, such transfer of property shall not be taxable under this article; if real or personal property, or any beneficial interest therein, so transferred is of the value of more than five hundred dollars,² it shall be taxable under this article at the rate of one per centum upon the clear market value of such property³ except as herein provided. No such tax shall be assessed upon property, real or personal, or any beneficial interest therein so transferred to a father, mother, widow or minor child of the decedent, grantor, donor or vendor, if the amount so transferred to such father, mother, widow or minor child is the sum of five thousand dollars or less; but if the amount so transferred to a father, mother, widow or a minor child is over five thousand

¹ Formerly "of less than ten thousand dollars."

² Formerly "of ten thousand dollars or more."

³ Remainder of paragraph new.

dollars the excess shall be taxable at the rate of one per centum upon the clear market value of such property as hereinbefore provided. The rates of taxation hereinbefore prescribed in this and the preceding section are hereby designated as "primary rates." Whenever any property, real or personal, or any beneficial interest therein which passes by any such transfer to or for the use of any person or corporation, shall exceed the amount of twenty-five thousand dollars over and above the exemptions hereinbefore provided the rate of taxation shall be as follows:

¹ Upon all amounts in excess of the said twenty-five thousand dollars and up to and including the sum of one hundred thousand dollars, twice the primary rates;

¹ Upon all amounts in excess of the said one hundred thousand dollars and up to and including the sum of five hundred thousand dollars, three times the primary rates;

¹ Upon all amounts in excess of the said five hundred thousand dollars and up to and including the sum of one million dollars, four times the primary rates;

² Upon all amounts in excess of the said one million dollars, five times the primary rates. But any property devised or bequeathed for religious ceremonies, observances or commemorative services of or for the deceased donor, or to any person who is a bishop or to any religious, educational, charitable, missionary, benevolent, hospital or infirmary corporation, including corporations organized exclusively for bible or tract purposes, shall be exempted from and not subject to the provisions of this article. There shall also be exempted from and not subject to the provisions of this article personal property other than money or securities bequeathed to a corporation or association organized exclusively for the moral or mental improvement of men or women or for scientific, literary, library, patriotic, cemetery or historical purposes or for the enforcement of laws relating to children or animals or for two or more of such purposes and used exclusively for carrying out one or more of such purposes. But no such corporation or association shall be entitled to such exemption if any officer, member or employee thereof shall receive or may be lawfully entitled to receive any pecuniary profit from the operations thereof except reasonable compensation for services in effecting one or more of such purposes or as proper beneficiaries of its strictly charitable purposes; or if the organization thereof for any such avowed purpose be a guise or pretense for directly or indirectly making any other pecuniary profit for such corporation or association or for any of its members or employees or if it be not in good faith organized or conducted exclusively for one or more of such purposes.

¹ Following paragraph new.

² Following sentence new.

§ 3. Section two hundred and twenty-nine of such chapter, as amended by chapter two hundred and eighty-three of the laws of nineteen hundred and nine, is hereby amended to read as follows: § 229, as amended by L. 1909, ch. 283, further amended.

§ 229. Appointment of appraisers, stenographers, and clerks.—

The state comptroller shall appoint and may at pleasure remove not to exceed six persons in the county of New York; three persons in the county of Kings, and one person in the counties of Albany, Dutchess, Erie, Monroe, Nassau, Oneida, Onondaga, Orange, Queens, Rensselaer, Richmond, Suffolk and Westchester, to act as appraisers therein. The appraisers so appointed shall receive an annual salary to be fixed by the state comptroller, together with their actual and necessary traveling expenses and witness fees, as hereinafter provided, payable monthly by the state comptroller out of any funds in his hands or custody on account of transfer tax. The salaries of each of the appraisers so appointed shall not exceed the following amounts: In New York county, four thousand dollars; in Kings county, four thousand dollars; in Erie county, three thousand dollars; in Westchester and Albany counties, twenty-five hundred dollars; in Nassau county, two thousand dollars; in Queens, Monroe and Onondaga counties, one thousand five hundred dollars; in Dutchess, Oneida, Orange, Rensselaer, Richmond and Suffolk counties, one thousand dollars. Each of the said appraisers shall file with the state comptroller his oath of office and his official bond in the penal sum of not less than one thousand dollars, in the discretion of the state comptroller, conditioned for the faithful performance of his duties as such appraiser, which bond shall be approved by the attorney-general and the state comptroller. The state comptroller shall retain out of any funds in his hands on account of said tax the following amounts: First, a sum sufficient to provide the appraisers of New York county with six stenographers, three clerks and an examiner of values, of Kings county with three stenographers, and of Erie county with one clerk, appointed by the state comptroller, whose salary shall not exceed fifteen hundred dollars a year each. Second, a sum to be used in defraying the expenses for office rent, stationery, postage, process serving and other similar expenses necessarily incurred in the appraisal of estates, not exceeding ten thousand five hundred dollars a year in New York county, and three thousand dollars a year in Kings county. ¹ Third, a sum not exceeding ten thousand dollars to be used in defraying the expenses for extra clerical and stenographic services in the transfer tax bureau of the comptroller's office at Albany, during the period ending September thirtieth, nineteen hundred and eleven.

§ 4. Section two hundred and forty-three of such chapter is hereby amended to read as follows: § 243 amended.

¹ Following sentence new.

§ 243. **Definitions.** The words "estate" and "property," as used in this article, shall be taken to mean the property or interest therein¹ passing or transferred to individual or corporate² legatees, devisees, heirs, next of kin, grantees, donees or vendees, and not the property or interest therein of the decedent, grantor, donor or vendor passing or transferred,³ and shall include all property or interest therein, whether situated within or without this state. The word "transfer," as used in this article, shall be taken to include the passing of property or any interest therein in possession or enjoyment, present or future, by inheritance, descent, devise, bequest, grant, deed, bargain, sale or gift, in the manner herein prescribed. The words "county treasurer" and "district attorney," as used in this article, shall be taken to mean the treasurer or the district attorney of the county of the surrogate having jurisdiction as provided in section two hundred and twenty-eight of this article.

Amendment by Laws of 1911, Chap. 24,

In effect September 1, 1911, amends section 447 of Code of Civil Procedure.

Amendment by Laws of 1911, Chap. 308,

In effect June 12, 1911, amended section 225, to-wit:

L. 1909,
ch. 62,
§ 225
amended.

Section 1. Section two hundred and twenty-five of chapter sixty-two of the laws of nineteen hundred and nine, entitled "An act in relation to taxation, constituting chapter sixty of the consolidated laws," is hereby amended to read as follows:

§ 225. **Refund of tax erroneously paid.** If any debts shall be proven against the estate of a decedent after the payment of any legacy or distributive share thereof, from which any such tax has been deducted or upon which it has been paid by the person entitled to such legacy or distributive share, and such person is required by order of the surrogate having jurisdiction, on notice to the state comptroller, to refund the amount of such debts or any part thereof, an equitable proportion of the tax shall be repaid to him by the executor, administrator or trustee, if the tax has not been paid to the state comptroller or county

¹ Words "of the testator, intestate, grantor, bargainor or vendor, passing or transferred to those not herein specifically exempted from the provisions of this article, and not as the property or interest therein," omitted.

² Words "or corporate," new.

³ Words "and not the property or interest therein of the decedent, grantor, donor or vendor passing or transferred," new.

treasurer; or if such tax has been paid to such state comptroller or county treasurer, such officer shall refund out of the funds in his hands or custody to the credit of such taxes such equitable proportion of the tax, and credit himself with the same in the account required to be rendered by him under this article. If after the payment of any tax in pursuance of an order fixing such tax, made by the surrogate having jurisdiction, such order be modified or reversed by the surrogate having jurisdiction ¹ within two years from and after the date of entry of the order fixing the tax, or be modified or reversed at any time on an appeal taken therefrom within the time allowed by law ² on due notice to the state comptroller, the state comptroller shall, if such tax was paid in a county in which the office of appraiser is salaried, refund to the executor, administrator, trustee, person or persons by whom such tax was paid, the amount of any moneys paid or deposited on account of such tax in excess of the amount of the tax fixed by the order modified or reversed, out of the funds in his hands or custody to the credit of such taxes, and to credit himself with the same in the account required to be rendered by him under this article, or if paid in a county in which the office of appraiser is not salaried, he shall by warrant direct and allow the county treasurer of the county to refund such amount in the same manner; but no application for such refund shall be made after one year from such reversal or modification, unless an appeal shall be taken therefrom, in which case no such application shall be made after one year from the final determination on such appeal or of an appeal taken therefrom,³ and the representatives of the estate, legatees, devisees or distributees entitled to any refund under this section shall not be entitled to any interest upon such refund, and the state comptroller shall deduct from the fees allowed by this article to the county treasurer the amount theretofore allowed him upon such overpayment. Where it shall be proved to the satisfaction of the surrogate that deductions for debts were allowed upon the appraisal, since proved to have been erroneously allowed, it shall be lawful for such surrogate to enter an order assessing the tax upon the amount wrongfully or erroneously deducted. ⁴ This section, as amended, shall apply to appeals and proceedings now pending and taxes heretofore paid in relation to which the period of one year from such reversal or modification has not expired when this section, as amended, takes effect.

¹ Words "by the surrogate having jurisdiction," new.

² Words "or be modified or reversed at any time on an appeal taken therefrom within the time allowed by law," new.

³ Words "unless an appeal . . . taken therefrom," new.

⁴ Following sentence new.

Amendment by Laws of 1911, Chap. 732,

In effect July 21, 1911, added a new section, **221a**, and amended sections **220**, **221** and **243**, to-wit:

L. 1909,
ch. 62, § 220,
as amended
by L. 1910,
ch. 706,
amended.

Section 1. Section two hundred and twenty of chapter sixty-two of the laws of nineteen hundred and nine, entitled "An act in relation to taxation, constituting chapter sixty of the consolidated laws," as amended by chapter seven hundred and six of the laws of nineteen hundred and ten, is hereby amended to read as follows:

§ 220. **Taxable transfers.** A tax shall be and is hereby imposed upon the transfer of any tangible property within the state and of intangible property, or of any interest therein or income therefrom, in trust or otherwise, to persons or corporations in the following cases, subject to the exemptions and limitations hereinafter prescribed:

1. When the transfer is by will or by the intestate laws of this state of any intangible property, or of tangible property within the state, from any person dying seized or possessed thereof while a resident of the state.

2. When the transfer is by will or intestate law, of tangible property within the state, and the decedent was a non-resident of the state at the time of his death.

3. Whenever the property of a resident decedent, or the property of a nonresident decedent within this state, transferred by will is not specifically bequeathed or devised, such property shall for the purposes of this article, be deemed to be transferred proportionately to and divided pro rata among all the general legatees and devisees named in said decedent's will, including all transfers under a residuary clause of such will.

4. When the transfer is of intangible property, or of tangible property within the state, made by a resident, or of tangible property within the state made by a nonresident, by deed, grant, bargain, sale or gift made in contemplation of the death of the grantor, vendor or donor or intended to take effect in possession or enjoyment at or after such death.

5. When any such person or corporation becomes beneficially entitled, in possession or expectancy, to any property or the income thereof by any such transfer whether made before or after the passage of this chapter.

6. Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property made either before or after the passage of this chapter, such appointment when made shall be deemed a transfer taxable under the provisions of this chapter in the same manner as though the property to which such

appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will.

7. The tax imposed hereby shall be upon the clear market value of such property, at the rates hereinafter prescribed.

§ 2. Section two hundred and twenty-one of said chapter, as amended by chapters six hundred and seven hundred and six of the laws of nineteen hundred and ten, is hereby amended as follows: § 221, as amended by L. 1910, chaps. 600, 706, amended.

§ 221. **Exceptions and limitations.** Any property devised or bequeathed for religious ceremonies, observances or commemorative services of or for the deceased donor, or to any person who is a bishop or to any religious, educational, charitable, missionary, benevolent, hospital or infirmary corporation, wherever incorporated, including corporations organized exclusively for bible or tract purposes shall be exempted from and not subject to the provisions of this article. There shall also be exempted from and not subject to the provisions of this article personal property other than money or securities bequeathed to a corporation or association wherever incorporated or located, organized exclusively for the moral or mental improvement of men or women or for scientific, literary, library, patriotic, cemetery or historical purposes or for the enforcement of laws relating to children or animals or for two or more of such purposes and used exclusively for carrying out one or more of such purposes. But no such corporation or association shall be entitled to such exemption if any officer, member or employee thereof shall receive or may be lawfully entitled to receive any pecuniary profit from the operations thereof except reasonable compensation for services in effecting one or more of such purposes or as proper beneficiaries of its strictly charitable purposes; or if the organization thereof for any such avowed purpose be a guise or pretense for directly or indirectly making any other pecuniary profit for such corporation or association or for any of its members or employees or if it be not in good faith organized or conducted exclusively for one or more of such purposes.

§ 3. Said chapter is hereby amended by adding after section two hundred and twenty-one a new section to be § 221a added.
two hundred and twenty-one-a, and is to read as follows:

§ 221-a. **Rates of tax.** 1. Upon a transfer taxable under this article of property or any beneficial interest therein, of an amount in excess of the value of five thousand dollars to any father, mother, husband, wife, child, brother, sister, wife or widow of a son, or the husband of a daughter, or any child or children adopted as such in conformity with the laws of this state, of the decedent, grantor, donor, or vendor, or to any child to whom any such decedent, grantor, donor, or vendor for not less than ten years prior to such transfer stood in the mutually acknowledged relation of a parent, provided, however, such relationship began at or before the child's fifteenth birthday and was

continuous for said ten years thereafter, or to any lineal descendant of such decedent, grantor, donor, or vendor born in lawful wedlock, the tax on such transfer shall be at the rate of

One per centum on any amount in excess of five thousand dollars up to the sum of fifty thousand dollars.

Two per centum on any amount in excess of fifty thousand dollars up to the sum of two hundred and fifty thousand dollars.

Three per centum on any amount in excess of two hundred and fifty thousand dollars up to the sum of one million dollars.

Four per centum on any amount in excess of one million dollars.

2. Upon a transfer taxable under this article of property or any beneficial interest therein of an amount in excess of the value of one thousand dollars to any person or corporation other than those enumerated in paragraph one of this section, the tax shall be at the rate of

Five per centum on any amount in excess of one thousand dollars up to the sum of fifty thousand dollars.

Six per centum on any amount in excess of fifty thousand dollars up to the sum of two hundred and fifty thousand dollars.

Seven per centum on any amount in excess of two hundred and fifty thousand dollars up to the sum of one million dollars.

Eight per centum on any amount in excess of one million dollars.

§ 243, as
amended by
L. 1910,
ch. 706,
amended.

§ 4. Section two hundred and forty-three of said chapter as amended by chapter seven hundred and six of the laws of nineteen hundred and ten is hereby amended to read as follows:

§ 243. **Definitions.** The words "estate" and "property," as used in this article, shall be taken to mean the property or interest therein passing or transferred to individual or corporate legatees, devisees, heirs, next of kin, grantees, donees or vendees, and not as the property or interest therein of the decedent, grantor, donor or vendor¹ and shall include all property or interest therein, whether situated within or without this state. ²The words "tangible property" as used in this article shall be taken to mean corporeal property such as real estate and goods, wares and merchandise, and shall not be taken to mean money, deposits in bank, shares of stock, bonds, notes, credits or evidences of an interest in property and evidences of debt. ³The words "intangible property" as used in this article shall be taken to mean incorporeal property, including money, deposits in bank, shares of stock, bonds, notes, credits, evidences of an interest in property and evidences of debt. The word "transfer," as used in this article, shall be taken to include the passing of property or any interest therein in the possession or enjoyment, present or future, by inheritance, descent, devise, bequest, grant, deed, bargain, sale or gift, in the manner herein

¹ Words "passing or transferred," omitted.

² Following sentence new.

prescribed. The words "county treasurer" and "district attorney," as used in this article, shall be taken to mean the treasurer or the district attorney of the county of the surrogate having jurisdiction as provided in section two hundred and twenty-eight of this article.

¹ The words "the intestate laws of this state," as used in this article, shall be taken to refer to all transfers of property, or any beneficial interest therein, effected by the statute of descent and distribution and the transfer of any property, or any beneficial interest therein, effected by operation of law upon the death of a person omitting to make a valid disposition thereof, including a husband's right as tenant by the curtesy or the right of a husband to succeed to the personal property of his wife who dies intestate leaving no descendants her surviving.

Amendment by Laws of 1911, Chap. 800,

In effect July 28, 1911, amended sections **230, 240, and 241**, to wit:

Section 1. Sections two hundred and thirty, two hundred and forty and two hundred and forty-one of chapter sixty-two of the laws of nineteen hundred and nine, entitled "An act in relation to taxation, constituting chapter sixty of the consolidated laws," are hereby amended to read, respectively, as follows:

L. 1909, ch.
62, §§ 230,
240, 241
amended.

§ 230. **Proceedings by appraiser.** In each county in which the office of appraiser is not salaried the county treasurer shall act as appraiser. The surrogate, either upon his own motion, or upon the application of any interested person, including the state comptroller, shall by order direct the person or one of the persons appointed pursuant to section two hundred and twenty-nine of this article in counties in which the office of appraiser is salaried, and in other counties, the county treasurer, to fix the fair market value of property of persons whose estates shall be subject to the payment of any tax imposed by this article.

Every such appraiser shall forthwith give notice by mail to all persons known to have a claim or interest in the property to be appraised, including the state comptroller, and to such persons as the surrogate may by order direct, of the time and place when he will appraise such property. He shall at such time and place appraise the same at its fair market value as herein prescribed; and for that purpose the said appraiser is authorized to issue subpoenas and to compel the attendance of witnesses before him and to take the evidence of such witnesses under oath concerning such property and the value thereof; and he shall make report thereof and of such value in writing, to the said surrogate, together with the depositions of the witnesses examined, and

¹ Following sentence new.

such other facts in relation thereto and to said matter as the surrogate may order or require. Every appraiser, except in the counties in which the office of appraiser is salaried, for which provision is hereinbefore made, shall be paid by the state comptroller and after the audit of said state comptroller, his actual and necessary traveling expenses and the fees paid such witnesses, which fees shall be the same as those now paid to witnesses subpoenaed to attend in courts of record, payment to be made out of funds in the hands of the county treasurer of the proper county on account of the tax imposed under the provisions of this article.

The value of every future or limited estate, income, interest or annuity dependent upon any life or lives in being, shall be determined by the rule, method and standard of mortality and value employed by the superintendent of insurance in ascertaining the value of policies of life insurance and annuities for the determination of liabilities of life insurance companies, except that the rate of interest for making such computation shall be five per centum per annum.

In estimating the value of any estate or interest in property, to the beneficial enjoyment or possession whereof there are persons or corporations presently entitled thereto, no allowance shall be made on account of any contingent incumbrance thereon, nor on account of any contingency upon the happening of which the estate or property or some part thereof or interest therein might be abridged, defeated or diminished; provided, however, that in the event of such incumbrance taking effect as an actual burden upon the interest of the beneficiary, or in the event of the abridgment, defeat or diminution of said estate or property or interest therein as aforesaid, a return shall be made to the person properly entitled thereto of a proportionate amount of such tax on account of the incumbrance when taking effect, or so much as will reduce the same to the amount which would have been assessed on account of the actual duration or extent of the estate or interest enjoyed. Such return of tax shall be made in the manner provided by section two hundred and twenty-five of this article.

Where any property shall, after the passage of this chapter, be transferred subject to any charge, estate or interest, determinable by the death of any person, or at any period ascertainable only by reference to death, the increase accruing to any person or corporation upon the extinction or determination of such charge, estate or interest, shall be deemed a transfer of property taxable under the provisions of this article in the same manner as though the person or corporation beneficially entitled thereto had then acquired such increase from the person from whom the title to their respective estates or interests is derived.

When property is transferred in trust or otherwise, and the rights, interest or estates of the transferees are dependent upon contingencies or conditions whereby they may be wholly or in part created, de-

feated, extended or abridged, a tax shall be imposed upon said transfer at the highest rate which, on the happening of any of the said contingencies or conditions, would be possible under the provisions of this article, and such tax so imposed shall be due and payable forthwith by the executors or trustees out of the property transferred, and the surrogate shall enter a temporary order determining the amount of said tax in accordance with this provision;¹ provided, however, that on the happening of any contingency whereby the said property, or any part thereof, is transferred to a person or corporation exempt from taxation under the provisions of this article, or to any person taxable at a rate less than the rate imposed and paid, such person or corporation shall be entitled to a return of so much of the tax imposed and paid as is the difference between the amount paid and the amount which said person or corporation should pay under the provisions of this article;² and the executor or trustee of each estate, or the legal representative having charge of the trust fund, shall immediately upon the happening of said contingencies or conditions apply to the surrogate of the proper county, upon a verified petition setting forth all the facts, and giving at least ten days' notice by mail to all interested persons or corporations, for an order modifying the temporary taxing order of said surrogate so as to provide for the final assessment and determination of the tax in accordance with the ultimate transfer or devolution of said property. Such return of overpayment shall be made in the manner provided by section two hundred and twenty-five of this article.

Estates in expectancy which are contingent or defeasible and in which proceedings for the determination of the tax have not been taken or where the taxation thereof has been held in abeyance, shall be appraised at their full, undiminished value when the persons entitled thereto shall come into the beneficial enjoyment or possession thereof, without diminution for or on account of any valuation theretofore made of the particular estates for purposes of taxation, upon which said estates in expectancy may have been limited.

Where an estate for life or for years can be divested by the act or omission of the legatee or devisee it shall be taxed as if there were no possibility of such divesting.

The report of the appraiser shall be made in duplicate, one of which duplicates shall be filed in the office of the surrogate and the other in the office of the state comptroller.

§ 240. Reports of county treasurer. Each county treasurer in a county in which the office of appraiser is not salaried shall make a report, under oath, to the state comptroller, on January, April, July

¹ Words "and the surrogate shall . . . with this provision," new.

² Remainder of sentence formerly read: "with interest thereon at the rate of three per centum per annum from the time of payment."

and October first of each year, of all taxes received by him under this article, stating for what estate and by whom and when paid. The form of such report may be prescribed by the state comptroller. He shall, at the same time, pay the state treasurer all taxes received by him under this article and not previously paid into the state treasury, except as provided in the next section,¹ and for all such taxes collected by him and not paid into the state treasury within thirty days from the times herein required, he shall pay interest at the rate of ten per centum per annum.

§ 241. **Report of state comptroller, payment of taxes; refunds in certain cases.**² The state comptroller shall deposit all taxes collected by him under this article, except as hereinafter otherwise provided,³ in a responsible bank, banking house or trust company in the city of Albany, which shall pay the highest rate of interest to the state for such deposit, to the credit of the state *comptroller on account of the transfer tax. And every such bank, banking house or trust company shall execute and file in his office an undertaking to the state, in the sum, and with such sureties, as are required and approved by the comptroller, for the safe keeping and prompt payment on legal demand therefor of all such moneys held by or on deposit in such bank, banking house or trust company, with interest thereon on daily balances at such rate as the comptroller may fix. Every such undertaking shall have indorsed thereon, or annexed thereto, the approval of the attorney-general as to its form. The state comptroller shall on the first day of each month make a verified return to the state treasurer of all taxes received by him under this article, stating for what estate, and by whom and when paid; and shall credit himself with all expenditures made since his last previous return on account of such taxes, for salary, refunds or other purposes lawfully chargeable thereto. He shall on or before the tenth day of each month pay to the state treasurer the balance of such taxes remaining in his hands at the close of business on the last day of the previous month, as appears from such returns.

⁴ Whenever the tax on a contingent remainder has been determined at the highest rate which on the happening of any of said contingencies or conditions would be possible under the provisions of this article, the state comptroller, in the counties wherein this tax is payable direct to him, and in all other counties the treasurer of said counties, respectively, when such tax is paid shall retain and hold to the credit of said estate so much of the tax assessed upon such contingent remainders as represents the difference between the tax at the highest rate and

* So in original.

¹ Words "except as provided in the next section," new.

² Words "refunds in certain cases," new.

³ Words "except as hereinafter otherwise provided," new.

⁴ Remainder of section new.

the tax upon such remainders which would be due if the contingencies or conditions had happened at the date of the appraisal of said estate, and the state comptroller or the county treasurer shall deposit the amount of tax so retained in some solvent trust company or trust companies or savings banks in this state, to the credit of such estate, paying the interest thereon when collected by him to the executor or trustee of said estate, to be applied by said executor or trustee as provided by the decedent's will. Upon the happening of the contingencies or conditions whereby the remainder ultimately vests in possession, if the remainder then passes to persons taxable at the highest rate, the state comptroller or the county treasurer shall turn over the amount so retained by him to the state treasurer as provided herein and by section two hundred and forty of this article, or if the remainder ultimately vests in persons taxable at a lower rate or a person or corporation exempt from taxation by the provisions of this article, the state comptroller or the county treasurer shall refund any excess of tax so held by him to the executor or trustee of the estate, to be disposed of by said executor or trustee as provided by the decedent's will. Executors or trustees of any estate may elect to assign to and deposit with the state comptroller or the county treasurer, bonds or other securities of the estate approved by the state comptroller, or the county treasurer, both as to the form of the collateral and the amount thereof, for the purpose of securing the payment of the difference between the tax on said remainder at the highest rate and the tax upon said remainder which would be due if the contingencies or conditions had happened at the date of the appraisal of said estate, and cash for the balance of said tax as assessed, which said bonds or other securities shall be held by the state comptroller, or the county treasurer, to the credit of said estate until the actual vesting of said remainders, the income therefrom when received by the state comptroller or the county treasurer to be paid over to the executor or trustee during the continuance of the trust estates and then to be finally disposed of in accordance with the ultimate transfer or devolution of said remainders as hereinbefore provided; and it shall be the duty of the executors or trustees of such estates to forthwith notify the state comptroller of the actual vesting of all such contingent remainders.

If any executor or trustee shall have deposited with the state comptroller, or the county treasurer, cash or securities, or both cash and securities, to an amount in excess of the sum necessary to pay the transfer tax upon such contingent remainders at the highest rate as aforesaid, the excess of tax so deposited shall be returned to the executor or trustee, or if any executor or trustee shall have deposited with the state comptroller, or the county treasurer, cash or securities, or both cash and securities, to an amount less than is sufficient to pay the tax upon such contingent remainders as finally assessed and determined, the executor or trustee of said estate shall forthwith, upon the

entry of the order determining the correct amount of tax due, pay to the state comptroller, or the county treasurer, whichever is entitled under the provisions of this article to receive the tax, the balance due on account of said tax.

Amendment by Laws of 1912, Chap. 206

In effect April 8, 1912, amends section 221, vide *supra*, page 42.

Amendment by Laws of 1913, Chaps. 356 and 795

Amend section 221, *supra*, page 42.

Amendment by Laws of 1913, Chap. 639

Adds section 221b, *supra*, page 43.

DECEDENT ESTATE LAW

Laws 1909, chap. 18, as amended by Laws 1909, chaps. 240 and 304; Laws 1911, chaps. 244 and 857; Laws 1912, chap. 384 and by Laws 1913, chaps. 153 and 489.

CHAPTER 13 OF THE CONSOLIDATED LAWS

DECEDENT ESTATE LAW

Article 1. Short title and definitions (§§ 1, 2).

2. Wills (§§ 10-48).

3. Descent and distribution (§§ 80-104).

4. Executors, administrators and testamentary trustees (§§ 110-122).

5. Laws repealed; when to take effect (§§ 130, 131).

ARTICLE 1

Short Title and Definitions

Section 1. Short title.

2. Definitions.

§ 1. **Short title.** This chapter shall be known as the "Decedent Estate Law."

§ 2. **Definitions.** The term "will," as used in this chapter, shall include all codicils, as well as wills.

ARTICLE 2

Wills

Section 10. Who may devise.

11. What real property may be devised.

12. Who may take real property by devise.

14. Wills of real estate, how construed.

15. Who may make wills of personal estate.

16. Unwritten wills of personal property, when allowed.

Section 17. Devise or bequest to certain societies, associations and corporations.

21. Manner of execution of will.
22. Witnesses to will to write names and places of residence.
23. What wills may be proved.
24. Effect of change of residence since execution of will.
25. Application of certain provisions to wills previously made.
26. Child born after making of will.
27. Devise or bequest to subscribing witness.
28. Action by child born after making of will, or by subscribing witness.
29. Devise or bequest to child or descendant or to a brother or sister of the testator not to lapse.
30. Reception of wills for safe keeping.
31. Sealing and indorsing wills received for safe keeping.
32. Delivery of wills received for safe keeping.
33. Opening wills received by surrogate for safe keeping.
34. Revocation and cancellation of written wills.
35. Revocation by marriage and birth of issue.
36. Will of unmarried woman.
37. Bond or agreement to convey property devised or bequeathed not a revocation.
38. Charge or incumbrance not a revocation.
39. Conveyance, when not to be deemed a revocation.
40. Conveyance, when to be deemed a revocation.
41. Canceling or revocation of second will not to revive first.
42. Record of wills in county clerk's office.
43. County clerk's index of recorded wills.
44. Recording will proved in another state or foreign country. (*Amended by L. 1909, ch. 240, § 12.*)
45. Authentication of papers from another state or foreign country for use in this state.
46. Validity of purchase notwithstanding devise.
47. Validity and effect of testamentary dispositions.
48. Application of certain sections in this article.

§ 10. **Who may devise.** All persons, except idiots, persons of unsound mind and infants, may devise their real estate, by a

last will and testament, duly executed, according to the provisions of this article.

§ 11. What real property may be devised. Every estate and interest in real property descendible to heirs, may be so devised.

§ 12. Who may take real property by devise. Such a devise of real property may be made to every person capable by law of holding real estate; but no devise to a corporation shall be valid, unless such corporation be expressly authorized by its charter, or by statute, to take by devise.

§ 14. Wills of real estate, how construed. Every will that shall be made by a testator, in express terms, of all his real estate, or in any other terms denoting his intent to devise all his real property, shall be construed to pass all the real estate, which he was entitled to devise, at the time of his death.

§ 15. Who may make wills of personal estate. Every male person of the age of eighteen years or upwards, and every female of the age of sixteen years or upwards, of sound mind and memory, and no others, may give and bequeath his or her personal estate, by will in writing.

§ 16. Unwritten wills of personal property, when allowed. No nuncupative or unwritten will, bequeathing personal estate, shall be valid, unless made by a soldier while in actual military service, or by a mariner, while at sea.

§ 17. Devise or bequest to certain societies, associations and corporations. No person having a husband, wife, child or parent, shall, by his or her last will and testament, devise or bequeath to any benevolent, charitable, literary, scientific, religious or missionary society, association or corporation, in trust or otherwise, more than one-half part of his or her estate, after the payment of his or her debts, and such devise or bequest shall be valid to the extent of one-half, and no more.

§ 21. Manner of execution of will. Every last will and testament of real or personal property, or both, shall be executed and attested in the following manner:

1. It shall be subscribed by the testator at the end of the will.

2. Such subscription shall be made by the testator in the presence of each of the attesting witnesses, or shall be acknowledged by him, to have been so made, to each of the attesting witnesses.

3. The testator, at the time of making such subscription, or at the time of acknowledging the same, shall declare the instrument so subscribed, to be his last will and testament.

4. There shall be at least two attesting witnesses, each of whom shall sign his name as a witness, at the end of the will, at the request of the testator.

§ 22. Witnesses to will to write names and places of residence. The witnesses to any will, shall write opposite to their names their respective places of residence; and every person who shall sign the testator's name to any will by his direction, shall write his own name as a witness to the will. Whoever shall neglect to comply with either of these provisions, shall forfeit fifty dollars, to be recovered by any person interested in the property devised or bequeathed, who will sue for the same. Such omission shall not affect the validity of any will; nor shall any person liable to the penalty aforesaid, be excused or incapacitated on that account, from testifying respecting the execution of such will.

§ 23. What wills may be proved. A will of real or personal property, executed as prescribed by the laws of the state, or a will of personal property executed without the state, and within the United States, the Dominion of Canada, or the Kingdom of Great Britain and Ireland, as prescribed by the laws of the state or country where it is or was executed, or a will of personal property executed by a person not a resident of the state, according to the laws of the testator's residence, may be admitted to probate in this state.

§ 24. Effect of change of residence since execution of will. The right to have a will admitted to probate, the validity of the execution thereof, or the validity or construction of any provision contained therein, is not affected by a change of the testator's residence made since the execution of the will.

§ 25. Application of certain provisions to wills previously made. The last two sections apply only to a will executed by a

person dying after April eleventh, eighteen hundred and seventy-six, and they do not invalidate a will executed before that date, which would have been valid but for the enactment of sections one and two of chapter one hundred and eighteen of the laws of eighteen hundred and seventy-six, except where such a will is revoked or altered, by a will which those sections rendered valid, or capable of being proved as prescribed in article first of title third of chapter eighteen of the code of civil procedure.

§ 26. Child born after making of will. Whenever a testator shall have a child born after the making of a last will, either in the lifetime or after the death of such testator, and shall die leaving such child, so after-born, unprovided for by any settlement, and neither provided for, nor in any way mentioned in such will, every such child shall succeed to the same portion of such parent's real and personal estate, as would have descended or been distributed to such child, if such parent had died intestate, and shall be entitled to recover the same portion from the devisees and legatees, in proportion to and out of the parts devised and bequeathed to them by such will.

§ 27. Devise or bequest to subscribing witness. If any person shall be a subscribing witness to the execution of any will, wherein any beneficial devise, legacy, interest or appointment of any real or personal estate shall be made to such witness, and such will can not be proved without the testimony of such witness, the said devise, legacy, interest or appointment shall be void, so far only as concerns such witness, or any claiming under him; and such person shall be a competent witness, and compellable to testify respecting the execution of the said will, in like manner as if no such devise or bequest had been made.

But if such witness would have been entitled to any share of the testator's estate, in case the will was not established, then so much of the share that would have descended, or have been distributed to such witness, shall be saved to him, as will not exceed the value of the devise or bequest made to him in the will, and he shall recover the same of the devisees or legatees named in the will, in proportion to, and out of, the parts devised and bequeathed to them.

§ 28. Action by child born after making of will, or by subscribing witness. A child, born after the making of a will, who is entitled to succeed to a part of the real or personal property of the testator, or a subscribing witness to a will, who is entitled to succeed to a share of such property, may maintain an action against the legatees or devisees, as the case requires, to recover his share of the property; and he is subject to the same liabilities, and has the same rights, and is entitled to the same remedies, to compel a distribution or partition of the property, or a contribution from other persons interested in the estate, or to gain possession of the property, as any other person who is so entitled to succeed.

§ 29. Devise or bequest to child or descendant, or to a brother or sister of the testator not to lapse. Whenever any estate, real or personal, shall be devised or bequeathed to a child or other descendant of the testator, or to a brother or sister of the testator, and such legatee or devisee shall die during the lifetime of the testator, leaving a child or other descendant who shall survive such testator, such devise or legacy shall not lapse, but the property so devised or bequeathed shall vest in the surviving child or other descendant of the legatee or devisee, as if such legatee or devisee had survived the testator and had died intestate. (*As amended by L. 1912, ch. 384, in effect May 5, 1912.*)

§ 30. Reception of wills for safe keeping. The clerk of every county in this state, the register of deeds in the city and county of New York, and the surrogate of every county, upon being paid the fees allowed therefor by law, shall receive and deposit in their offices respectively, any last will or testament which any person shall deliver to them for that purpose, and shall give a written receipt therefor to the person depositing the same.

§ 31. Sealing and indorsing wills received for safe keeping. Such will shall be inclosed in a sealed wrapper, so that the contents thereof can not be read, and shall have indorsed thereon the name of the testator, his place of residence, and the day, month and year when delivered; and shall not, on any pretext whatever, be opened, read or examined, until delivered to a person entitled to the same, as hereinafter directed.

§ 32. Delivery of wills received for safe keeping. Such will shall be delivered only,

1. To the testator in person; or,
2. Upon his written order, duly proved by the oath of a subscribing witness; or,
3. After his death to the persons named in the indorsement on the wrapper of such will, if any such indorsement be made thereon; or,
4. If there be no such indorsement, and if the same shall have been deposited with any other officer than a surrogate, then to the surrogate of the county.

§ 33. Opening wills received by surrogate for safe keeping. If such will shall have been deposited with a surrogate, or shall have been delivered to him as above prescribed, such surrogate, after the death of the testator, shall publicly open and examine the same, and make known the contents thereof, and shall file the same in his office, there to remain until it shall have been duly proved, if capable of proof, and then to be delivered to the person entitled to the custody thereof; or until required by the authority of some competent court to produce the same in such court.

§ 34. Revocation and cancellation of written wills. No will in writing, except in the cases hereinafter mentioned, nor any part thereof, shall be revoked, or altered, otherwise than by some other will in writing, or some other writing of the testator, declaring such revocation or alteration, and executed with the same formalities with which the will itself was required by law to be executed; or unless such will be burnt, torn, canceled, obliterated or destroyed, with the intent and for the purpose of revoking the same, by the testator himself, or by another person in his presence, by his direction and consent; and when so done by another person, the direction and consent of the testator, and the fact of such injury or destruction, shall be proved by at least two witnesses.

§ 35. Revocation by marriage and birth of issue. If after the making of any will, disposing of the whole estate of the testator, such testator shall marry, and have issue of such marriage, born either in his lifetime or after his death, and the wife or the issue of such marriage shall be living at the death of the

testator, such will shall be deemed revoked, unless provision shall have been made for such issue by some settlement, or unless such issue shall be provided for in the will, or in such way mentioned therein, as to show an intention not to make such provision; and no other evidence to rebut the presumption of such revocation, shall be received.

§ 36. Will of unmarried woman. A will executed by an unmarried woman, shall be deemed revoked by her subsequent marriage.

§ 37. Bond or agreement to convey property devised or bequeathed not a revocation. A bond, agreement, or covenant, made for a valuable consideration, by a testator, to convey any property devised or bequeathed in any will previously made, shall not be deemed a revocation of such previous devise or bequest, either at law or in equity; but such property shall pass by the devise or bequest, subject to the same remedies on such bond, agreement or covenant, for a specific performance or otherwise, against the devisees or legatees, as might be had by law against the heirs of the testator, or his next of kin, if the same had descended to them.

§ 38. Charge or incumbrance not a revocation. A charge or incumbrance upon any real or personal estate, for the purpose of securing the payment of money, or the performance of any covenant, shall not be deemed a revocation of any will relating to the same estate, previously executed; but the devises and legacies therein contained, shall pass and take effect, subject to such charge or incumbrance.

§ 39. Conveyance, when not to be deemed a revocation. A conveyance, settlement, deed, or other act of a testator, by which his estate or interest in property, previously devised or bequeathed by him, shall be altered, but not wholly divested, shall not be deemed a revocation of the devise or bequest of such property; but such devise or bequest shall pass to the devisee or legatee, the actual estate or interest of the testator, which would otherwise descend to his heirs, or pass to his next of kin; unless in the instrument by which such alteration is made, the intention is declared, that it shall operate as a revocation of such previous devise or bequest.

§ 40. Conveyance, when to be deemed a revocation. But if the provisions of the instrument by which such alteration is made, are wholly inconsistent with the terms and nature of such previous devise or bequest, such instrument shall operate as a revocation thereof, unless such provisions depend on a condition or contingency, and such condition be not performed, or such contingency do not happen.

§ 41. Canceling or revocation of second will not to revive first. If, after the making of any will, the testator shall duly make and execute a second will, the destruction, canceling or revocation of such second will, shall not revive the first will, unless it appear by the terms of such revocation, that it was his intention to revive and give effect to his first will; or unless after such destruction, canceling or revocation, he shall duly republish his first will.

§ 42. Record of wills in county clerk's office. A will of real property, which has been, at any time, either before or after this chapter takes effect duly proved in the supreme court, or the court of chancery, or before a surrogate of the state with the certificate of proof thereof annexed thereto, or indorsed thereon, or an exemplified copy thereof, may be recorded in the office of the clerk or the register, as the case requires, of any county in the state, in the same manner as a deed of real property. Where the will relates to real property, the executor or administrator, with the will annexed, must cause the same, or an exemplified copy thereof, to be so recorded, in each county where real property of the testator is situated, within twenty days after letters are issued to him. An exemplification of the record of such a will, from any surrogate's or other office where the same has been so recorded, either before or after this chapter takes effect, may be in like manner recorded in the office of the clerk or register of any county. Such a record or exemplification, or an exemplification of the record thereof, must be received in evidence, as if the original will was produced and proved.

§ 43. County clerk's index of recorded wills. Upon recording a will or exemplification, as prescribed in the last section, the clerk or register must index it in the same books, and substantially in the same manner, as if it was a deed recorded in his office.

§ 44. Recording will proved in another state or foreign country. Where real property situated within this state, or an interest therein, is devised or made subject to a power of disposition by a will duly executed in conformity with the laws of this state, of a person who was at the time of his, or her death, a resident elsewhere within the United States, or in a foreign country, and such will has been admitted to probate within the state or territory, or foreign country, where the decedent so resided, and is filed or recorded in the proper office as prescribed by the laws of that state or territory or foreign country, a copy of such will or of the record thereof and of the proofs or of the records thereof, or if the proofs are not on file or recorded in such office, of any statement, on file or recorded in such office, of the substance of the proofs, authenticated as prescribed in section forty-five of this chapter, or if no proofs and no statement of the substance of the proofs be on file or recorded in such office, a copy of such will or of the record thereof, authenticated as prescribed in said section forty-five, accompanied by a certificate that no proofs or statement of the substance of proof of such will, are or is on file or recorded in such office, made and likewise authenticated as prescribed in said section forty-five, may be recorded in the office of the surrogate of any county in this state where such real property is situated; and such record in the office of such surrogate or an exemplified copy thereof shall be presumptive evidence of such will and of the execution thereof, in any action or special proceeding relating to such real property. (*Thus amended by L. 1909, ch. 240, § 13, in effect April 22, 1909.*)

Amendment of 1909 changed the word "found" to "proved" in the title to the section.

§ 45. Authentication of papers from another state or foreign country for use in this state. To entitle a copy of a will admitted to probate or of letters testamentary or of letters of administration, granted in any other state or in any territory of the United States, and of the proofs or of any statement of the substance of the proofs of any such will, or of the record of any such will, letters, proofs or statement, to be recorded or used in this state as provided in article seventh of title third of chapter eighteenth of the code of civil procedure or in section forty-four of this chapter, such copy must be authenticated by the seal of the court or officer by which or whom such will was ad-

mitted to probate or such letters were granted, or having the custody of the same or of the record thereof, and the signature of a judge of such court or the signature of such officer and of the clerk of such court or officer if any; and must be further authenticated by a certificate under the great or principal seal of such state or territory, and the signature of the officer who has the custody of such seal, to the effect that the court or officer by which or whom such will was admitted to probate or such letters were granted, was duly authorized by the laws of such state or territory to admit wills to probate or to grant letters testamentary or of administration and to keep the same and records thereof; that the seal of such court or officer affixed to such copy is genuine, and that the officer making such certificate under such seal of such state or territory verily believes that each of the signatures attesting such copy is genuine; and to entitle any certificate concerning proofs accompanying the copy of the will or of the record so authenticated, to be recorded or used in this state, as provided in said article or section, such certificate must be under the seal of the court or officer by which or whom such will was admitted to probate, or having the custody of such will or record, and the signature of a judge or the clerk of such court, or the signature of such officer, authenticated by a certificate under such great or principal seal of such state or territory, and the signature of the officer having the custody thereof, to the effect that the seal of the court or officer affixed to such certificate concerning proofs is genuine, and that such officer making such certificate under such seal of such state or territory, verily believes that the signature to such certificate concerning proofs is genuine. To entitle a copy of a will admitted to probate or of letters testamentary, or of letters of administration, granted in a foreign country, and of the proofs or of any statement of the substance of the proofs of any such will, or of the record of any such will, letters, proofs or statement, to be recorded or used in this state, as provided in said article or section, such copy must be authenticated in the manner prescribed by the laws of such foreign country, and must be further authenticated by a certificate of a judge of a court of record or by the chief officer of the department of justice of such foreign country to the effect that such authentication is in conformity with the laws of such foreign country, and that the court or officer by which or by whom such will was so admitted to probate, or such letters were granted, was duly authorized

by the laws of such foreign country to admit wills to probate, or to grant letters testamentary or of administration, and to keep the same and records thereof; and the signature and official character of such judge or court of record or of such chief officer of the department of justice shall be attested by a consular officer of the United States, resident in such foreign country, under the seal of his office; and to entitle any certificate concerning proofs accompanying the copy of the will or of the records so authenticated, to be used and recorded in this state, as provided in said article or section, such certificate concerning the proofs must be similarly authenticated and attested. (*Thus amended by L. 1909, ch. 304, in effect September 1, 1909.*)

Amendment of 1909 substituted an entirely new sentence for the former second sentence which read as follows: To entitle a copy of a will admitted to probate or of letters testamentary or of letters of administration granted in a foreign country, and of the proofs or of any statement of the substance of the proofs of any such will or of the record of any such will, letters, proofs or statement to be recorded or used in this state, as provided in said article or section, such copy must be authenticated in the manner prescribed by the laws of such foreign country for the authentication of a copy of such a record or paper; and there must be annexed thereto a certificate of a consul-general, vice-consul-general, deputy-consul-general, consul, vice-consul or deputy consul of the United States residing within the country in which such will was so admitted to probate or such letters were granted, under his seal of office or the seal of the consulate to which he is attached, to the effect that such authentication is regular and in conformity to the laws of such foreign country, and also that the court or officer by which or by whom such will was so admitted to probate or such letters were granted was duly authorized by the laws of such foreign country to admit wills to probate or to grant letters testamentary or of administration and to keep the same and records thereof; and to entitle any certificate concerning proofs accompanying the copy of a will, or of the record so authenticated, to be recorded or used in this state, as provided in said article or section, such certificate must be similarly authenticated and there must be annexed thereto a similar certificate by a consul-general, vice-consul-general, deputy-consul-general, consul, vice-consul or deputy consul of the United States.

§ 46. Validity of purchase notwithstanding devise. The title of a purchaser in good faith and for a valuable consideration, from the heir of a person who died seized of real property, shall not be affected by a devise of the property made by the latter, unless within four years after the testator's death, the will devising the same is either admitted to probate and recorded as a will of real property in the office of the surrogate having jurisdiction, or established by the final judgment of a court of competent jurisdiction of the state, in an action brought

for that purpose. But if, at the time of the testator's death, the devisee is either within the age of twenty-one years, or insane, or imprisoned on a criminal charge, or in execution upon conviction of a criminal offense, for a term less than for life; or without the state; or, if the will was concealed by one or more of the heirs of the testator, the limitation created by this section does not begin until after the expiration of one year from the removal of such a disability, or the delivery of the will to the devisee or his representative, or to the proper surrogate.

§ 47. Validity and effect of testamentary dispositions. The validity and effect of a testamentary disposition of real property, situated within the state, or of an interest in real property so situated, which would descend to the heir of an intestate, and the manner in which such property or such an interest descends, where it is not disposed of by will, are regulated by the laws of the state, without regard to the residence of the decedent. Except where special provision is otherwise made by law, the validity and effect of a testamentary disposition of any other property situated within the state, and the ownership and disposition of such property, where it is not disposed of by will, are regulated by the laws of the state or country, of which the decedent was a resident, at the time of his death. Whenever a decedent, being a citizen of the United States, wherever resident, shall have declared in his will and testament that he elects that such testamentary disposition shall be construed and regulated by the laws of this state, the validity and effect of such dispositions shall be determined by such laws. (*As amended by L. 1911, ch. 244, in effect June 6, 1911.*)

§ 48. Application of certain sections in this article. Section twenty-five hundred and fourteen of the code of civil procedure is applicable to the provisions of sections twenty-three to twenty-five, both inclusive, and sections forty-two to forty-seven, both inclusive, of this chapter. (*Added by L. 1909, ch. 240, § 16, in effect April 22, 1909.*)

ARTICLE 3

Descent and Distribution

- Section 80. Definitions and use of terms; effect of article.
81. General rule of descent.
82. Lineal descendants of equal degree.
83. Lineal descendants of unequal degree.
84. When father inherits.
85. When mother inherits.
86. When collateral relatives inherit; collateral relatives of equal degree.
87. Brothers and sisters and their descendants.
88. Brothers and sisters of father and mother and their descendants and grandparents.
89. Illegitimate children.
90. Relatives of the half-blood.
91. Relatives of husband or wife.
92. Cases not hereinbefore provided for.
93. Posthumous children and relatives.
94. Inheritance, sole or in common.
95. Alienism of ancestor.
96. Advancements of real and personal estates.
97. How advancement adjusted.
98. Distribution of personal property of decedent.
99. Advancements of personal estates.
100. Estates of married women.
101. Liability of heirs and devisees for debt of decedent.
102. Liability of heir or devisee not affected where will makes specific provision for payment of debt.
103. Action against husband for debts of deceased wife.
104. Application of certain sections in this article.

§ 80. Definitions and use of terms; effect of article.

1. The term "real property" as used in this article, includes every estate, interest and right, legal and equitable, in lands, tenements and hereditaments, except such as are determined or extinguished by the death of an intestate, seized or possessed thereof, or in any manner entitled thereto; leases for years, estates for the life of another person; and real property held in trust, not devised by the beneficiary. "Inheritance" means real

property as herein defined, descended according to the provisions of this article.

2. The expressions "Where the inheritance shall have come to the intestate on the part of the father" or "mother," as the case may be, include every case where the inheritance shall have come to the intestate by devise, gift or descent from the parent referred to, or from any relative of the blood of such parent.

3. When in this article a person is described as "living," it means living at the time of the death of the intestate from whom the descent came; when he is described as having "died," it means that he died before such intestate.

4. This article does not affect a limitation of an estate by deed or will, or tenancy by the courtesy or dower.

§ 81. General rule of descent. The real property of a person who dies without devising the same shall descend:

1. To his lineal descendants.
2. To his father.
3. To his mother; and
4. To his collateral relatives, as prescribed in the following sections of this article.

§ 82. Lineal descendants of equal degree. If the intestate leave descendants in the direct line of lineal descent, all of equal degree of consanguinity to him, the inheritance shall descend to them in equal parts however remote from him the common degree of consanguinity may be.

§ 83. Lineal descendants of unequal degree. If any of the descendants of such intestate be living, and any be dead, the inheritance shall descend to the living, and the descendants of the dead, so that each living descendant shall inherit such share as would have descended to him had all the descendants in the same degree of consanguinity who shall have died leaving issue been living; and so that issue of the descendants who shall have died shall respectively take the shares which their ancestors would have received.

§ 84. When father inherits. If the intestate die without lawful descendants, and leave a father, the inheritance shall go to such father, unless the inheritance came to the intestate on the part of his mother, and she be living; if she be dead, the in-

heritance descending on her part shall go to the father for life, and the reversion to the brothers and sisters of the intestate and their descendants, according to the law of inheritance by collateral relatives hereinafter provided; if there be no such brothers or sisters or their descendants living, such inheritance shall descend to the father in fee.

§ 85. When mother inherits. If the intestate die without descendants and leave no father, or leave a father not entitled to take the inheritance under the last section, and leave a mother, and a brother or sister, or the descendant of a brother or sister, the inheritance shall descend to the mother for life, and the reversion to such brothers and sisters of the intestate as may be living, and the descendants of such as may be dead, according to the same law of inheritance hereinafter provided. If the intestate in such case leave no brother or sister or descendant thereof, the inheritance shall descend to the mother in fee.

§ 86. When collateral relatives inherit; collateral relatives of equal degree. If there be no father or mother capable of inheriting the estate, it shall descend in the cases hereinafter specified to the collateral relatives of the intestate; and if there be several such relatives, all of equal degree of consanguinity to the intestate, the inheritance shall descend to them in equal parts, however remote from him the common degree of consanguinity may be.

§ 87. Brothers and sisters and their descendants. If all the brothers and sisters of the intestate be living, the inheritance shall descend to them; if any of them be living and any be dead, to the brothers and sisters living, and the descendants, in whatever degree, of those dead; so that each living brother or sister shall inherit such share as would have descended to him or her if all the brothers and sisters of the intestate who shall have died, leaving issue, had been living, and so that such descendants in whatever degree shall collectively inherit the share which their parent would have received if living; and the same rule shall prevail as to all direct lineal descendants of every brother and sister of the intestate whenever such descendants are of unequal degrees.

§ 88. Brothers and sisters of father and mother and their descendants and grandparents. If there be no heir entitled

to take, under either of the preceding sections, the inheritance, if it shall have come to the intestate on the part of the father, shall descend:

1. To the brothers and sisters of the father of the intestate in equal shares, if all be living.

2. If any be living, and any shall have died, leaving issue, to such brothers and sisters as shall be living and to the descendants of such as shall have died.

3. If all such brothers and sisters shall have died, to their descendants.

4. If there be no such brothers or sisters of such father, nor any descendants of such brothers or sisters, to the brothers and sisters of the mother of the intestate, and to the descendants of such as shall have died, or if all have died, to their descendants. But, if the inheritance shall have come to the intestate on the part of his mother, it shall descend to her brothers and sisters and their descendants; and if there be none, to the brothers and sisters of the father and their descendants, in the manner aforesaid. If the inheritance has not come to the intestate on the part of either father or mother, it shall descend to the brothers and sisters both of the father and mother of the intestate, and their descendants in the same manner. In all cases mentioned in this section the inheritance shall descend to the brothers and sisters of the intestate's father or mother, as the case may be, or to their descendants in like manner as if they had been the brothers and sisters of the intestate.

5. If there be no such brothers or sisters of such father or mother, nor any descendants of such brothers or sisters, the inheritance, if it shall have come to the intestate on the part of his father, shall descend to his father's parents, then living, in equal parts, and if they be dead, then to his mother's parents, then living, in equal parts; but if the inheritance shall have come to the intestate on the part of his mother, it shall descend to his mother's parents, then living, in equal parts, and if they be dead, to his father's parents, then living, in equal parts. If the inheritance has not come to the intestate on the part of either father or mother, it shall descend to his living grandparents in equal parts.

§ 89. **Illegitimate children.** If an intestate who shall have been illegitimate die without lawful issue, or illegitimate issue entitled to take, under this section, the inheritance shall descend

to his mother; if she be dead, to his relatives on her part, as if he had been legitimate. If a woman die without lawful issue, leaving an illegitimate child, the inheritance shall descend to him as if he were legitimate. In any other case illegitimate children or relatives shall not inherit.

§ 90. Relatives of the half-blood. Relatives of the half-blood and their descendants, shall inherit equally with those of the whole blood and their descendants, in the same degree, unless the inheritance came to the intestate by descent, devise or gift from an ancestor; in which case all those who are not of the blood of such ancestor shall be excluded from such inheritance.

§ 91. Relatives of husband or wife. When the inheritance shall have come to the intestate from a deceased husband or wife, as the case may be, and there be no person entitled to inherit under any of the preceding sections, then such real property of such intestate shall descend to the heirs of such deceased husband or wife, as the case may be, and the persons entitled, under the provisions of this section, to inherit such real property, shall be deemed to be the heirs of such intestate.

§ 92. Cases not hereinbefore provided for. In all cases not provided for by the preceding sections of this article, the inheritance shall descend according to the course of the common law.

§ 93. Posthumous children and relatives. A descendant or a relative of the intestate begotten before his death, but born thereafter, shall inherit in the same manner as if he had been born in the lifetime of the intestate and had survived him.

§ 94. Inheritance, sole or in common. When there is but one person entitled to inherit, he shall take and hold the inheritance solely; when an inheritance or a share of an inheritance descends to several persons they shall take as tenants in common, in proportion to their respective rights.

§ 95. Alienism of ancestor. A person capable of inheriting under the provisions of this article, shall not be precluded from such inheritance by reason of the alienism of an ancestor.

§ 96. Advancements of real and personal estates. If a child of an intestate shall have been advanced by him, by settlement or portion, real or personal property, the value thereof must be reckoned for the purposes of descent and distribution as part of the real and personal property of the intestate descendible to his heirs and to be distributed to his next of kin; and if such advancement be equal to or greater than the amount of the share which such child would be entitled to receive of the estate of the deceased, such child and his descendants shall not share in the estate of the intestate; but if it be less than such share, such child and his descendants shall receive so much, only, of the personal property, and inherit so much only, of the real property, of the intestate, as shall be sufficient to make all the shares of all the children in the whole property, including the advancement, equal. The value of any real or personal property so advanced, shall be deemed to be that, if any, which was acknowledged by the child by an instrument in writing; otherwise it must be estimated according to the worth of the property when given. Maintaining or educating a child, or giving him money without a view to a portion or settlement in life is not an advancement. An estate or interest given by a parent to a descendant by virtue of a beneficial power, or of a power in trust with a right of selection, is an advancement.

§ 97. How advancement adjusted. When an advancement to be adjusted consisted of real property, the adjustment must be made out of the real property descendible to the heirs. When it consisted of personal property, the adjustment must be made out of the surplus of the personal property to be distributed to the next of kin. If either species of property is insufficient to enable the adjustment to be fully made, the deficiency must be adjusted out of the other.

§ 98. Distribution of personal property of decedent. If the deceased died intestate, the surplus of his personal property after payment of debts; and if he left a will, such surplus, after the payment of debts and legacies, if not bequeathed, must be distributed to his widow, children, or next of kin, in manner following:

1. One-third part to the widow, and the residue in equal portions among the children, and such persons as legally represent the children if any of them have died before the deceased.

2. If there be no children, nor any legal representatives of them, then one-half of the whole surplus shall be allotted to the widow, and the other half distributed to the next of kin of the deceased, entitled under the provisions of this section.

3. If the deceased leaves a widow, and no descendant, parent, brother or sister, nephew or niece, the widow shall be entitled to the whole surplus; but if there be a brother or sister, nephew or niece, and no descendant or parent, the widow shall be entitled to one-half of the surplus as above provided, and to the whole of the residue if it does not exceed two thousand dollars; if the residue exceeds that sum, she shall receive in addition to the one-half, two thousand dollars; and the remainder shall be distributed to the brothers and sisters and their representatives.

4. If there be no widow, the whole surplus shall be distributed equally to and among the children, and such as legally represent them.

5. If there be no widow, and no children, and no representatives of a child, the whole surplus shall be distributed to the next of kin, in equal degree to the deceased, and their legal representatives; and if all the brothers and sisters of the intestate be living, the whole surplus shall be distributed to them; if any of them be living and any be dead, to the brothers and sisters living, and the descendants in whatever degree of those dead; so that to each living brother or sister shall be distributed such share as would have been distributed to him or her if all the brothers and sisters of the intestate who shall have died leaving issue had been living, and so that there shall be distributed to such descendants in whatever degree, collectively, the share which their parent would have received if living; and the same rule shall prevail as to all direct lineal descendants of every brother and sister of the intestate whenever such descendants are of unequal degrees.

6. If the deceased leave no children and no representatives of them, and no father, and leave a widow and a mother, the half not distributed to the widow shall be distributed in equal shares to his mother and brothers and sisters, or the representatives of such brothers and sisters; and if there be no widow, the whole surplus shall be distributed in like manner to the mother, and to the brothers and sisters, or the representatives of such brothers and sisters.

7. If the deceased leave a father and no child or descendant, the father shall take one-half if there be a widow, and the whole, if there be no widow.

8. If the deceased leave a mother, and no child, descendant, father, brother, sister, or representative of a brother or sister, the mother, if there be a widow, shall take one-half; and the whole, if there be no widow.

9. If the deceased was illegitimate and leave a mother, and no child, or descendant, or widow, such mother shall take the whole and shall be entitled to letters of administration in exclusion of all other persons. If the mother of such deceased be dead, the relatives of the deceased on the part of the mother shall take in the same manner as if the deceased had been legitimate, and be entitled to letters of administration in the same order.

10. Where the descendants, or next of kin of the deceased, entitled to share in his estate, are all in equal degree to the deceased, their shares shall be equal.

11. When such descendants or next of kin are of unequal degrees of kindred, the surplus shall be apportioned among those entitled thereto, according to their respective stocks; so that those who take in their own right shall receive equal shares, and those who take by representation shall receive the share to which the parent whom they represent, if living, would have been entitled.

12. No representation shall be admitted among collaterals after brothers and sisters descendants. This subdivision shall not apply to the estate of a decedent who shall have died prior to May eighteenth, nineteen hundred and five. (*Sub. 12 thus amended by L. 1909, ch. 240, § 14, in effect April 22, 1909.*)

Amendment of 1909 struck out the words "the time this act shall take effect" which preceded "May."

13. Relatives of the half-blood shall take equally with those of the whole blood in the same degree; and the representatives of such relatives shall take in the same manner as the representatives of the whole blood.

14. Descendants and next of kin of the deceased, begotten before his death, but born thereafter, shall take in the same manner as if they had been born in the lifetime of the deceased, and had survived him.

15. If a woman die, leaving illegitimate children, and no lawful issue, such children inherit her personal property as if legitimate.

15a. If there be no husband or wife surviving and no children, and no representatives of a child, and no next of kin, then the

whole surplus shall be allotted to a surviving child of the husband or wife of the deceased, or if there be more than one, it shall be distributed equally among them. (*Added by L. 1913, ch. 489, in effect May 14, 1913.*)

16. If there be no husband or wife surviving and no children, and no representatives of a child, and no next of kin, and no child or children of the husband or wife of the deceased, then the whole surplus shall be distributed equally to and among the next of kin of the husband or wife of the deceased, as the case may be, and such next of kin shall be deemed next of kin of the deceased for all the purposes specified in this article or in chapter eighteen of the code of civil procedure; but such surplus shall not, and shall not be construed to, embrace any personal property except such as was received by the deceased from such husband or wife, as the case may be, by will or by virtue of the laws relating to the distribution of the personal property of the deceased person. (*As amended by L. 1913, ch. 489, in effect May 14, 1913.*)

§ 99. **Advancements of personal estates.** If any child of such deceased person have been advanced by the deceased, by settlement or portion of real or personal property, the value thereof shall be reckoned with that part of the surplus of the personal property, which remains to be distributed among the children; and if such advancement be equal or superior to the amount, which, according to the preceding section, would be distributed to such child, as his share of such surplus and advancement, such child and his descendants shall be excluded from any share in the distribution of the surplus. If such advancement be not equal to such amount, such child, or his descendants, shall be entitled to receive so much only, as is sufficient to make all the shares of all the children, in such surplus and advancement, to be equal, as near as can be estimated. The maintaining or educating, or the giving of money to a child, without a view to a portion or settlement in life, shall not be deemed an advancement, within the meaning of this section, nor shall the foregoing provisions of this section apply in any case where there is any real property of the intestate to descend to his heirs.

§ 100. **Estates of married women.** The provisions of this article respecting the distribution of property of deceased persons apply to the personal property of married women dying, leaving descendants them surviving. The husband of any such

deceased married woman shall be entitled to the same distributive share in the personal property of his wife to which a widow is entitled in the personal property of her husband by the provisions of this article and no more.

§ 101. Liability of heirs and devisees for debt of decedent.

The heirs of an intestate, and the heirs and devisees of a testator, are respectively liable for the debts of the decedent, arising by simple contract, or by specialty, to the extent of the estate, interest, and right in the real property, which descended to them from, or was effectually devised to them by, the decedent.

§ 102. Liability of heir or devisee not affected where will makes specific provision for payment of debt. The preceding section and article two of title three of chapter fifteen of the code of civil procedure do not affect the liability of an heir or devisee, for a debt of a testator, where the will expressly charges the debt exclusively upon the real property descended or devised, or makes it payable exclusively by the heir or devisee, or out of the real property descended or devised, before resorting to the personal property, or to any other real property descended or devised.

§ 103. Action against husband for debts of deceased wife.

If a surviving husband does not take out letters of administration on the estate of his deceased wife, he is presumed to have assets in his hands sufficient to satisfy her debts, and is liable therefor. A husband is liable as administrator for the debts of his wife only to the extent of the assets received by him. If he dies leaving any assets of his wife unadministered, except as otherwise provided by law, they pass to his executors or administrators as part of his personal property, but are liable for her debts in preference to the creditors of the husband. (*Thus amended by L. 1909, ch. 240, § 15, in effect April 22, 1909.*)

Amendment of 1909 changed the first word "the" in the third sentence to "his."

§ 104. Application of certain sections in this article. Section twenty-five hundred and fourteen of the code of civil procedure is applicable to the provisions of sections ninety-eight to one hundred, both inclusive, and section one hundred and three, of this chapter. (*Added by L. 1909, ch. 240, § 16, in effect April 22, 1909.*)

ARTICLE 4

Executors, Administrators and Testamentary Trustees

Section 110. Sales of real estate by executors under authority of will.

- 111. *Investment of trust funds by executor or administrator.
- 112. Executors de son tort abolished.
- 113. Special promise to answer for debt of testator or intestate.
- 114. Liability of executors and administrators of executors and administrators.
- 115. Rights of administrators de bonis non.
- 116. Actions upon contract by and against executors.
- 117. Administrators to have same rights and liabilities as executors.
- 118. Actions of trespass by executors and administrators.
- 119. Actions of trespass against executors and administrators.
- 120. Actions for wrongs, by or against executors and administrators.
- 121. Action or proceeding by executor of executor.
- 122. Appraisal of estate of deceased person.

§ 110. **Sales of real estate by executors under authority of will.** Sales of real estate situate within the state of New York, made by executors in pursuance of an authority given by any last will, unless otherwise directed in such will, may be public or private and on such terms as in the opinion of the executor shall be most advantageous to those interested therein.

§ 111. **Investment of trust funds.** An executor, administrator, trustee or other person holding trust funds for investment may invest the same in the same kind of securities as those in which savings banks of this state are by law authorized to invest the money deposited therein, and the income derived therefrom, and in bonds and mortgages on unincumbered real property in this state worth fifty per centum more than the amount

*So in original.

loaned thereon. Any executor, administrator, trustee or other person holding trust funds may require such personal bonds or guaranties of payment to accompany investments as may seem prudent, and all premiums paid on such guaranties may be charged to or paid out of income, providing that such charge or payment be not more than at the rate of one-half of one per centum per annum on the par value of such investments. But no trustee shall purchase securities hereunder from himself.

§ 112. Executors de son tort abolished. No person shall be liable to an action as executor of his own wrong, for having received, taken or interfered with, the property or effects of a deceased person; but shall be responsible as a wrong-doer in the proper action to the executors, or general or special administrators, of such deceased person, for the value of any property or effects so taken or received, and for all damages caused by his acts, to the estate of the deceased.

§ 113. Special promise to answer for debt of testator or intestate. No executor or administrator shall be chargeable upon any special promise to answer damages, or to pay the debts of the testator or intestate, out of his own estate, unless the agreement for that purpose, or some memorandum or note thereof, be in writing, and signed by such executor or administrator, or by some other person by him thereunto specially authorized.

§ 114. Liability of executors and administrators of executors and administrators. The executors and administrators of every person, who, as executor, either of right or in his own wrong, or as administrator, shall have wasted or converted to his own use, any goods, chattels, or estate, of any deceased person, shall be chargeable in the same manner as their testator or intestate would have been, if living.

§ 115. Rights of administrators de bonis non. When administration of the effects of a deceased person, which shall have been left unadministered by any previous executor or administrator of the same estate, shall be granted to any person, such person may appeal from any judgment obtained against such previous executor or administrator of the same estate, or against the original testator or intestate; and shall defend any

appeal from any such judgment; and shall have the same remedies, in the prosecution or defense of any action, by or against such previous executors or administrators, and for the collection and enforcing of any judgment obtained by them, as they would have by law.

§ 116. Actions upon contract by and against executors. Actions of account, and all other actions upon contract, may be maintained by and against executors, in all cases in which the same might have been maintained, by or against their respective testators.

§ 117. Administrators to have same rights and liabilities as executors. Administrators shall have actions to demand and recover the debts due to their intestate, and the personal property and effects of their intestate; and shall answer and be accountable to others to whom the intestate was holden or bound, in the same manner as executors.

§ 118. Actions of trespass by executors and administrators. Executors and administrators shall have actions of trespass against any person who shall have wasted, destroyed, taken or carried away, or converted to his own use, the goods of their testator or intestate in his lifetime. They may also maintain actions for trespass committed on the real estate of the deceased, in his lifetime.

§ 119. Actions of trespass against executors and administrators. Any person, or his personal representatives, shall have actions of trespass against the executor or administrator of any testator or intestate, who in his lifetime shall have wasted, destroyed, taken or carried away, or converted to his own use, the goods or chattels of any such person, or committed any trespass on the real estate of any such person.

§ 120. Actions for wrongs, by or against executors and administrators. For wrongs done to the property, rights or interests of another, for which an action might be maintained against the wrong-doer, such action may be brought by the person injured, or after his death, by his executors or administrators, against such wrong-doer, and after his death against his executors or administrators, in the same manner and with

the like effect in all respects, as actions founded upon contracts. This section shall not extend to an action for personal injuries, as such action is defined in section thirty-three hundred and forty-three of the code of civil procedure; except that nothing herein contained shall affect the right of action now existing to recover damages for injuries resulting in death. (*Added by L. 1909, ch. 240, § 16, in effect April 22, 1909.*)

§ 121. Action or proceeding by executor of executor. An executor of an executor shall have no authority to commence or maintain any action or proceeding relating to the estate, effects or rights of the testator of the first executor, or to take any charge or control thereof, as such executor. (*Added by L. 1909, ch. 240, § 16, in effect April 22, 1909.*)

§ 122. Appraisal of estate of deceased person. Whenever by reason of the provisions of any law of this state it shall become necessary to appraise in whole or in part the estate of any deceased person, the persons whose duty it shall be to make such appraisal shall value the real estate at its full and true value, taking into consideration actual sales of neighboring real estate similarly situated during the year immediately preceding the date of such appraisal, if any; and they shall value all such property, stocks, bonds, or securities as are customarily bought or sold in open markets in the city of New York or elsewhere, for the day on which such appraisal or report may be required, by ascertaining the range of the market and the average of prices as thus found, running through a reasonable period of time. (*Re-numbered by L. 1909, ch. 240, § 17. Formerly § 120.*)

ARTICLE 5

Laws Repealed; When to Take Effect

Section 130. Laws repealed.

131. When to take effect.

§ 130. Laws repealed. Of the laws enumerated in the schedule hereto annexed, that portion specified in the last column is hereby repealed.

§ 131. When to take effect. This chapter shall take effect immediately.

SCHEDULE OF LAWS REPEALED

Revised Statutes.... Part 2, chapter 6, title 1, §§ 1-5, 21, 22,
40-53, 69-71.

Revised Statutes.... Part 2, chapter 6, title 4, §§ 55, 58.

Revised Statutes.... Part 2, chapter 6, title 5, §§ 1-6, 23.

Revised Statutes.... Part 3, chapter 7, title 3, §§ 67-70.

Revised Statutes.... Part 3, chapter 8, title 3, §§ 17, 18.

*Revised Statutes... Part 3, chapter 8, title 3, §§ 1, 2, 11.

Laws of	Chapter	Section.
1787.....	47.....	All.
1799.....	75.....	All.
1801.....	9.....	All.
R. L. 1813...	23.....	All.
R. L. 1813...	75.....	All.
1815.....	157.....	All.
1821.....	207.....	All.
1828.....	21.....	1, ¶¶ 83, 95, 196, 336, 544 (2d meet.)
1828.....	313.....	All.
1829.....	148.....	All.
1835.....	264.....	All.
1837.....	234.....	All.
1840.....	348.....	1.
1848.....	319.....	Proviso in § 6.
1860.....	360.....	All.
1865.....	368.....	Proviso in § 6.
1867.....	782.....	3, 4.
1869.....	22.....	All.
1873.....	397.....	Proviso in § 5.
1875.....	267.....	Proviso in § 7.
1875.....	343.....	Proviso in § 5.
1876.....	118.....	All.
1883.....	65.....	All.
1886.....	236.....	Proviso in § 7.
1887.....	315.....	Proviso in § 5.
1887.....	317.....	Proviso in § 7.
1890.....	286.....	Proviso in § 6.
1891.....	34.....	1, pt. relating to estates of deceased persons.

* Inserted and expressly repealed by L. 1909, ch. 240, § 93. In effect April 22, 1909.

Laws of	Chapter	Section.
1893.....	100.....	All.
1896.....	547.....	280-296.
1897.....	417.....	9, pt. relating to executors, administrators and other trustees of estates of deceased persons.
1902.....	295.....	1, pt. amending L. 1897, Ch. 417, § 9, as to executors, administrators and other trustees of estates of deceased persons.
1903.....	623.....	Pt. amending the proviso in L. 1848, Ch. 319, § 6.
*1904.....	106.....	All.
1904.....	146.....	All.
1907.....	669.....	1, pt. amending L. 1897, Ch. 417, § 9, as to executors, administrators and other trustees of estates of deceased persons.

Code Civil Procedure §§ 1843, 1859, 1868, 2611, 2628, 2633; § 2634, to and including words "in his office"; § 2660, words "If a surviving husband" to "creditors of the husband"; §§ 2694, 2703, 2704, 2732; § 2733, except last two sentences; § 2734.

* Inserted and expressly repealed by L. 1909, ch. 240, § 106. In effect April 22, 1909.

STOCK TRANSFER STATUTE

The statute relating to tax on transfers of stock is Article 12 of The Tax Law, and as amended reads as follows:

ARTICLE 12

Tax on Transfers of Stock

Section 270.	Amount of tax.	Section 275a.	Registration; penalty for failure.
271.	Stamps, how prepared and sold.	276.	Power of state comptroller.
271a.	Sale of stamps.	277.	Civil penalties; how recovered.
272.	Penalty for failure to pay tax.	278.	Effect of failure to pay tax.
273.	Canceling stamp; penalty for failure.	279.	Application of taxes.
274.	Contracts for dies; expenses how paid.	280.	Refund of tax erroneously paid.
275.	Illegal use of stamps; penalty.		

§ 270. Amount of tax. There is hereby imposed and shall immediately accrue and be collected a tax, as herein provided, on all sales, or agreements to sell, or memoranda of sales of stock, and upon any and all deliveries or transfers of shares or certificates of stock, in any domestic or foreign association, company or corporation, made after the first day of June, nineteen hundred and five, whether made upon or shown by the books of the association, company or corporation, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of sale or transfer, whether intermediate or final, and whether investing the holder with the beneficial interest in or legal title to said stock, or merely with the possession or use thereof for any purpose, or to secure the future payment of money, or the future transfer of any stock, on each hundred dollars of face value or fraction thereof, two cents, except in cases where the shares or certificates of stock are issued without designated monetary value, in which cases the tax shall be at the rate of two cents for each and every share of such stock. It shall be the duty of the person or persons making or effectuating the sale or transfer to procure, affix and cancel the stamps and pay the tax provided by this article. It is not intended by this act to impose a tax upon an agreement evidencing the deposit of stock certificates as collateral security for money loaned

thereon, which stock certificates are not actually sold, nor upon such stock certificates so deposited, nor upon mere loans of stock or the return thereof. The payment of such tax shall be denoted by an adhesive stamp or stamps affixed as follows: In the case of a sale or transfer, where the evidence of the transaction is shown only by the books of the association, company or corporation, the stamp shall be placed upon such books, and it shall be the duty of the person making or effectuating such sale or transfer to procure and furnish to the association, company or corporation the requisite stamps, and of such association, company or corporation to affix and cancel the same. Where the transaction is effected by the delivery or transfer of a certificate, the stamp shall be placed upon the surrendered certificate and canceled, and in cases of an agreement to sell, or where the sale is effected by delivery of the certificate assigned in blank, there shall be made and delivered by the seller to the buyer, a bill or memorandum of such sale to which the stamp provided for by this article shall be affixed and canceled. Every such bill or memorandum of sale or agreement to sell shall show the date of the transaction which it evidences, the name of the seller, the stock to which it relates, and the number of shares thereof. All such bills or memoranda of sale shall bear a number upon the face thereof and no more than one such bill or memorandum of sale made by the seller on any given day shall bear the same number. The aforesaid identification number of the bill or memorandum of sale shall in all cases be entered and recorded in the book of account required to be kept by section two hundred and seventy-six of this chapter; and no further tax is hereby imposed upon the delivery of the certificate of stock, or upon the actual issue of a new certificate when the original certificate of stock is accompanied by the duly stamped memorandum of sale as herein provided. (*Thus am'd by L. 1910, chap. 38; L. 1911, chap. 352; L. 1912, ch. 292; L. 1913, chap. 779, in effect July 1, 1913.*)

§ 271. Stamps, how prepared and sold. Adhesive stamps for the purpose of paying the state tax provided for by this article shall be prepared by the state comptroller, in such form, and of such denominations and in such quantities as he may from time to time prescribe, and shall be sold by him to the person or persons desiring to purchase the same; he shall make provision for the sale of such stamps by such persons, in such place and at such times as in his judgment he may deem necessary.

He may from time to time and as often as he deems advisable provide for the issuance and exclusive use of stamps of a new design and forbid the use of stamps of any other design. In order to effect such a change and to discontinue the use of stamps of a former design he shall publish or cause to be published once in each week for each of three months immediately preceding the time for taking effect of such change, in one or

more daily newspapers published in each of the first and second class cities of the state, a notice to the effect that after a certain day, which shall be at least three months after the first publication of said notice, none other than the new issue or design of stamps shall be accepted or made use of in payment of the tax provided for by this article. After such date it shall be unlawful for any person to make use of any other than the new issue or design of stamps in payment of such tax. Any person violating any of the provisions of this section shall be guilty of a misdemeanor.

Any person lawfully in possession of unused stamps of an old or superseded issue or design may, within ninety days from the time when such change becomes effective as aforesaid, surrender the same to the comptroller together with a sworn statement setting forth the name and address of the owner and party surrendering said stamps, how, when and from whom the same were acquired and such other pertinent information as the comptroller may require; whereupon the comptroller shall redeem such unused and surrendered stamps by exchanging therefor stamps of a like denomination of the new issue or design. Failure or refusal of the comptroller to redeem the same by such an exchange may be enforced by mandamus. (*Thus am'd by L. 1913, chap. 811, in effect Nov. 14, 1913.*)

§ 271a. Sale of stamps. No person, firm, company, association or corporation other than a corporation organized under the banking law of this state or under the national bank act of the United States, or a duly authorized agent of the comptroller, shall sell or expose for sale any stamp issued pursuant to this article, and purchased or acquired by him after the time when this act shall take effect, without * his obtaining from the comptroller his written consent to sell such stamps, except that in connection with a sale of or agreement to sell stock a broker or agent of the principal making such sale or agreement to sell may supply and affix the stamp or stamps required by this article. No person shall sell any stamp so purchased or acquired for a sum less than the face value thereof without the written consent of the comptroller. Any person violating any of the provisions of this section shall be guilty of a misdemeanor. (*Thus am'd by L. 1913, chap. 811, in effect Nov. 14, 1913.*)

§ 272. Penalty for failure to pay tax. Any person or persons liable to pay the tax by this article imposed, and any one who acts in the matter as agent or broker for such person or persons, who shall make any sale, transfer or delivery of shares or certificates of stock, without paying the tax by this article imposed, and any person who shall in pursuance of any sale, transfer or agreement, deliver any stock or evidence of the sale or transfer of or agreement to sell any stock, or bill

* So in original.

or memorandum thereof, or who shall transfer or cause the same to be transferred upon the books or records of the association, company or corporation, and any association, company or corporation whose stock is sold or transferred, which shall transfer or cause the same to be transferred upon its books, without having the stamps provided for in this article affixed thereto, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not less than five hundred nor more than one thousand dollars, or be imprisoned for not more than six months or by both such fine and imprisonment, in the discretion of the court. (*Thus am'd by L. 1911, chap. 352, L. 1912, ch. 292, in effect May 1, 1912.*)

§ 273. Canceling stamps; penalty for failure. In every case where an adhesive stamp shall be used to denote the payment of the tax provided by this article, the person using or affixing the same shall write or stamp thereupon the initials of his name and the date upon which the same shall be attached or used, and shall cut or perforate the stamp in a substantial manner, so that such stamp cannot be again used; and if any person makes use of an adhesive stamp to denote the payment of the tax imposed by this article, without so effectually canceling the same, such person shall be deemed guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not less than two hundred nor more than five hundred dollars or be imprisoned for not less than six months, or both, in the discretion of the court. (*Thus am'd by L. 1911, chap. 352, in effect June 15, 1911.*)

§ 274. Contracts for dies; expenses how paid. The state comptroller is hereby directed to make, enter into and execute for and in behalf of the state such contract or contracts for dies, plates and printing necessary for the manufacture of the stamps provided for by this article, and provide such stationery and clerk hire together with such books and blanks as in his discretion may be necessary for putting into operation the provisions of this article; he shall be the custodian of all stamps, dies, plates or other material or thing furnished by him and used in the manufacture of such state tax stamps, and all expenses incurred by him and under his direction in carrying out the provisions of this article shall be paid to him by the state treasurer from any moneys appropriated for such purpose.

§ 275. Illegal use of stamps; penalty. Any person who shall willfully remove or alter or knowingly permit to be removed or altered the canceling or defacing marks of any stamp provided for by this article with intent to use such stamp, or who shall knowingly or willfully buy, prepare for use, use, have in his possession or suffer to be used any washed, restored or counterfeit stamp, and any person who shall intentionally remove or cause to be removed or knowingly permit to be

removed any stamp, affixed pursuant to the requirements of this article, shall be guilty of a misdemeanor and on conviction thereof shall be liable to a fine of not less than five hundred nor more than one thousand dollars, or be imprisoned for not more than one year, or by both such fine and imprisonment, at the discretion of the court. (*Thus am'd by L. 1911, chap. 12; L. 1912, chap. 292, in effect May 1, 1912.*)

§ 275a. Registration; penalty for failure. Every person, firm, company, association or corporation engaged in whole or in part in the making or negotiating of sales, agreements to sell, deliveries or transfers of shares or certificates of stock, or conducting or transacting a stock brokerage business, and every association, company or corporation which shall keep or cause to be kept within the state of New York a place for the sale, transfer or delivery of its stock, shall within ten days after this act shall take effect, or if at the time this act shall take effect, not engaged in such business or maintaining such a place for the sale or transfer of its stock, within ten days after engaging in such business or after establishing such place for the sale or transfer of its stock, as the case may be, file in the office of the comptroller a certificate setting forth the name under which such business is, or is to be, conducted or transacted, and the true or real full name or names of the person or persons conducting or transacting the same, with the post-office address or addresses of said person or persons, unless the party so certifying be a corporation, in which event it shall set forth its said place of business and when and where incorporated. Said certificate shall be executed and duly acknowledged by the person or persons so conducting or intending to conduct said business or by the president or secretary of the corporation as the case may be.

In the event of a change in the persons composing such firm, company or association or of the address of any such person, firm, company, association or corporation, or termination of such business or relationship, a like certificate setting forth the facts with respect to such change or termination shall within ten days thereafter be filed in the office of the comptroller.

Any such person, firm, company, association or corporation who shall fail to comply with the provisions of this section shall be guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not less than one hundred dollars nor more than five hundred dollars or be imprisoned for not more than six months or by both such fine and imprisonment, in the discretion of the court. (*Thus added by L. 1913, chap. 779, in effect July 1, 1913.*)

§ 276. Power of state comptroller. Every person, firm, company, association or corporation, engaged in whole or in part in the making or negotiating of sales, agreements to sell, deliveries or transfers of shares

or certificates of stock, or conducting or transacting a brokerage business, shall keep or cause to be kept at some accessible place within the state of New York, a just and true book of account, in such form as may be prescribed by the comptroller, wherein shall be plainly and legibly recorded in separate columns, the date of making every sale, agreement to sell, delivery or transfer of shares or certificates of stock, the name of the stock and the number of shares thereof, the face value of the stock, the name of the seller or transferor, the name of the purchaser or transferee and the number and face value of the adhesive stamps affixed and the identifying number of the bill or memorandum of sale as used as provided for by section two hundred and seventy of this chapter.

Every association, company or corporation shall keep or cause to be kept at some accessible place within the state of New York a stock certificate book and a just and true book of account, transfer ledger or register, in such form as may be prescribed by the comptroller, wherein shall be plainly and legibly recorded in separate columns the date of making every transfer of stock, the name of the stock and the number of shares thereof, the serial number of each surrendered certificate, the name of the party surrendering such certificate, the serial number of the certificate issued in exchange therefor, the number of shares covered by said certificate, the name of the party to whom said certificate was issued and evidence of the payment of the tax provided for by section two hundred and seventy of this chapter, which evidence, however, shall be provided in one of the following manners and not otherwise, to wit:

(a) By attaching to the stock certificate surrendered for transfer, the stamps required for such transfer, or

(b) If the stamps are not attached to the certificate, but are attached to the bill or memorandum of sale effecting or evidencing the transfer of such certificate, by attaching to said certificate the said bill or memorandum of sale with stamps attached, or

(c) If the stamps covering the transfer are attached to a bill or memorandum effecting a transfer of one or more certificates or to one or more certificates included in said transfer, a notation must be made upon such certificates, bill or memorandum, as the case may be, clearly specifying and identifying the certificate or certificates of stock to the sale or transfer of which the said stamps apply, or

(d) If the bill or memorandum bearing such stamps is not attached to the surrendered certificate or certificates to which it applies, a notation must be made upon such bill or memorandum stating the serial number or numbers of the certificates to which said bill or memorandum applies, as provided by section two hundred and seventy of this chapter. It shall also retain and keep all surrendered or canceled shares or certificates of its stock and all memoranda relating to the sale or transfer or any thereof. All such books of account,

transfer ledgers, registers and stock certificate books shall be retained and kept as aforesaid for a period of at least two years subsequent to the date of the last entry made therein as herein required; and all such surrendered or canceled shares or certificates of stock and memoranda relating to the sale or transfer of stock, shall be retained and kept for a period of at least two years from the date of the delivery thereof. For the purpose of ascertaining whether the tax imposed by this article has been paid, all such books of account, transfer ledgers, registers, stock certificate books, surrendered or canceled shares or certificates of stock and memoranda relating to the sale or transfer thereof, shall at all times between the hours of ten o'clock in the forenoon and three o'clock in the afternoon, except Saturdays, Sundays and legal holidays, be open to examination by the comptroller or his duly authorized representative.

The comptroller may enforce his right to examine such books of account and bills of memoranda of sale or transfer; and such transfer ledger, register and stock certificate books and surrendered or canceled shares or certificates of stock by mandamus. If the comptroller ascertains that the tax provided for in this article has not been paid, he shall bring an action in his name as such comptroller, in any court of competent jurisdiction for the recovery of such tax and for any penalty incurred by any person under the provisions of this article.

Every person, firm, company, association or corporation who shall fail to keep such book of account or bills or memoranda of sale or transfer, or transfer ledger, register or stock certificate book or surrendered or canceled shares or certificates of stock as herein required, or who alters, cancels, obliterates or destroys any part of said records, or makes any false entry therein, or who shall refuse to permit the comptroller or any of his authorized representatives freely to examine any of said books, records or papers at any of the times herein provided, or who shall in any other respect violate any of the provisions of this section shall be deemed guilty of a misdemeanor and on conviction thereof shall for each and every such offense pay a fine of not less than five hundred dollars nor more than five thousand dollars, or be imprisoned not less than three months nor more than two years, or both in the discretion of the court. (*Thus am'd by L. 1910, chap. 453; L. 1911, chap. 352; L. 1912, chap. 292; L. 1913, chap. 779, in effect July 1, 1913.*)

§ 277. Civil penalties; how recovered. Any person, firm, company, association or corporation who shall violate any of the provisions of section two hundred and seventy or section two hundred and seventy-two of this chapter shall in addition to the penalties herein provided forfeit to the people of the state a civil penalty of ten dollars for each and every share of stock so sold or transferred, or transferred or entered

upon the books of the corporation, as the case may be, without the payment of the tax by this article imposed thereon. Any person who shall violate any of the other provisions of this article shall in addition to the penalties hereinbefore provided forfeit to the people of the state a civil penalty of five hundred dollars for each and every such violation.

The state comptroller shall bring action in his name as such comptroller in any court of competent jurisdiction for the recovery of any civil penalty; and all moneys collected by him shall be paid into the state treasury. In an action against a corporation or its transfer agent to recover a penalty because of its transfer of stock upon the books or records of the corporation without requiring the payment of the tax by this article imposed, the failure of the corporation or its transfer agent, on the demand of the comptroller or his duly authorized representative, to produce the surrender certificate or memoranda of sale with the required stamps attached, shall constitute prima facie proof of the nonpayment of the tax imposed by section two hundred and seventy of this chapter. (*Thus am'd by L. 1912, chap. 292, in effect May 1, 1912.*)

§ 278. Effect of failure to pay tax. No transfer of stock made after June first, nineteen hundred and five, on which a tax is imposed by this article, and which tax is not paid at the time of such transfer, shall be made the basis of any action or legal proceedings, nor shall proof thereof be offered or received in evidence in any court in this state.

§ 279. Application of taxes. The taxes imposed under this article and the revenues thereof shall be paid by the state comptroller into the state treasury and be applicable to the general fund, and to the payment of all claims and demands which are a lawful charge thereon.

§ 280. Refund of tax erroneously paid. If any stamp or stamps shall have been erroneously affixed to any book, certificate of stock, or bill or memorandum of sale, the comptroller may, upon presentation of a claim for the amount of such stamp or stamps and upon the production of evidence satisfactory to him that such stamp or stamps was or were so erroneously affixed as to cause loss to the person or persons making such claim, pay such amount, or such part thereof as he may allow, to such claimant out of any moneys appropriated for that purpose. Such claims shall be presented to the comptroller in writing, duly verified, and shall state the full name and address of the claimant, the date of such erroneous affixing, the face value of such stamp or stamps and shall describe the instrument to which the stamp or stamps were affixed and contain such evidence as may be available upon which the demand for such refund is based. Such claims shall be presented within ninety days after such erroneous affixing unless such affixing shall have taken place prior to the date on which this act shall take

effect, in which case such claim shall be presented within ninety days after the date on which this act shall take effect. If the comptroller rejects a claim or any part thereof, the claimant may file a claim for the recovery of such sum as the comptroller shall have refused to allow, with the court of claims, which shall constitute a private claim against the state and shall be subject to all the provisions of law governing such claims, except that all claims so presented shall be filed with the court of claims within ninety days from the date on which such claim shall be rejected by the comptroller. For the purposes of this section, the comptroller's decision shall be deemed to have been made at the time of the depositing of a copy of such decision in the post-office inclosed in a duly post-paid wrapper and directed to the person making such claim at the address contained in the verified claim presented to the comptroller as hereinbefore provided. (*Added by L. 1910, chap. 186, in effect April 29, 1910.*)

TAXES ON TRANSFERS OF STOCK

RULINGS OF THE STATE COMPTROLLER

For the information of the public the Comptroller, under date of July 1, 1913, issued the following statement of the more general rules and regulations governing the imposition and collection of stock transfer taxes, prepared pursuant to the rulings made by the Attorney-General.

1. The application and scope of the Stock Transfer Tax Law has been considerably broadened by the amendments thereto, effected by chapter 352 of the Laws of 1911, chapter 292 of the Laws of 1912, and chapter 779 of the Laws of 1913, with the result that the rulings heretofore made asserting exemptions from the tax are not now as a rule controlling.

2. By the statute as amended, a tax is imposed upon all sales or agreements to sell and upon all deliveries or transfers of shares or certificates of stock of any and all associations, companies and corporations, whether domestic or foreign at the rate of two cents on each hundred dollars of face value or fraction thereof, except where shares or certificates of stock are issued without designated monetary value, in which case the tax shall be two cents for each and every share of such stock.

3. The statute does not apply to the original issue of stock; but all sales or transfers made subsequent thereto, whether intermediate or final, are taxable.

4. It is not necessary to render it taxable that the transaction involve a sale. By the statute, as amended, a tax is imposed upon all sales or transfers of shares or certificates of stock, whether operating to convey the beneficial interest in or merely the legal title to said stock, or possession thereof for any purpose. *The only exceptions to this rule are those expressly provided for in section 270 of the law.*

5. The transfer to and from voting trustees is taxable, also the transfer of voting trust certificates.

6. The mere surrender of a certificate of stock for reissue in smaller denominations is not taxable; but if reissued in part to the original owner and in part to a third party it is taxable to the extent of the transfer to the third party.

7. Likewise the mere surrender of a certificate of stock held by a

deceased person for issuance in the name of his executor or administrator is not taxable; but all transfers made by the latter, whether to trustees, legatees or other persons, are taxable.

8. The law applies to the stock of foreign as well as domestic corporations and to residents and non-residents alike.

9. While the law has no extra territorial operation, nevertheless, where it appears that the transfer of the stock on the corporate books within this State is essential to render the transfer effectual, it subjects it to a tax although in all other respects made without the State.

10. It is the duty of the person making or effectuating the sale or transfer to pay the required tax by procuring, affixing and canceling the stamps, except that where a sale or transfer is shown only by the books of the corporation, the person making the sale must secure, and the corporation affix and cancel the stamps to its books. (Sec. 270.)

11. Where the sale or transfer is effected by the delivery or transfer of a certificate the stamp must be placed upon the surrendered certificate. In case of an agreement to sell, or where the sale is effected by the delivery of the certificate assigned in blank, there must be made and delivered by the seller to the buyer a bill or memorandum of such sale, to which the stamps shall be affixed and canceled. This bill or memorandum with stamp attached must be affixed to the certificate, or properly identified as provided by section 276, when presented for transfer.

A strict compliance with these requirements will be insisted upon.

12. Every such bill or memorandum of sale, agreement to sell or sales ticket must show:

(a) The date of the transaction which it evidences.

(b) The name of the seller.

(c) The stock to which it relates and the number of shares thereof; and all such memorandum of sale or sales ticket as are not used for the purpose of transfer must be kept by the broker for two years from their respective dates.

(d) And an identifying number as provided by section 270.

13. All persons liable for the payment of the tax and all persons acting as agents or brokers for any such persons or for the corporation whose stock is transferred, who in any manner assists in consummating a sale or transfer without payment of the required tax, are guilty of a misdemeanor.

14. Likewise corporations, and persons acting as transfer agents for corporations, are forbidden to transfer stock on the books of the corporation until the required tax has been paid; and for a failure to perform this duty they are guilty of a misdemeanor.

15. Every stamp used to denote the payment of the tax must be canceled by the user by writing or stamping thereon the initials of his name and the date upon which the stamp is attached or used. He must also cut or perforate the stamp in a substantial manner so that

it cannot again be used. A failure so to do renders the party guilty of a misdemeanor.

16. Under no circumstances may a stamp erroneously attached to a certificate or memorandum be removed. An adequate remedy in such cases, in the nature of a refund, is provided by section 280 of the act.

17. Every broker is required to keep a just and true book of account in the form prescribed by the Comptroller (see form designated "account book to be kept by brokers" on page 2) wherein shall be plainly and legibly recorded in separate columns:

- (a) The date of making every sale, agreement to sell, delivery or transfer of shares or certificates of stock.
- (b) The name of the stock and the number of shares thereof.
- (c) The face value thereof.
- (d) The name of the seller or transferrer.
- (e) The name of the purchaser or transferee.
- (f) The identifying number of the bill or memorandum of sales as provided by section 270.

These books must be kept for a period of at least two years subsequent to the date of such entry made therein and are subject to examination by the Comptroller or his representatives at all times between 10 A. M. and 3 P. M. (Saturdays, Sundays and legal holidays excepted).

18. Every corporation or its transfer agent shall keep a just and true book of account in the form prescribed by the Comptroller (see form designated "account book to be kept by corporations and transfer agents" on page 2), wherein shall be plainly and legibly recorded in separate columns:

- (a) The date of making every transfer of stock.
- (b) The name of the stock and the number of shares thereof.
- (c) The serial number of each surrendered certificate.
- (d) The name of the party surrendering each certificate.
- (e) The serial number of the certificate issued in exchange therefor.
- (f) The number of shares represented by said certificate.
- (g) The name of the party to whom said certificate was issued.
- (h) The evidence of the payment of the tax as provided by section 276.

It shall also keep and retain a stock certificate book and all surrendered or canceled shares or certificates of its stock and memoranda relating to the sale thereof for a period of two years from the date of the delivery thereof.

All such books and papers are subject to the examination by the Comptroller or his representative at any time between the hours of 10 A. M. and 3 P. M. (Saturdays, Sundays and legal holidays excepted).

19. It is imperative that these books, records and memoranda be kept and retained strictly in the form and manner provided by the statute and severe penalties are imposed for a failure so to do.

20. Severe penalties, civil and criminal, are also provided by the act for the illegal sale or use of stamps, for the removal or re-use thereof, for the failure to pay the tax imposed and for the violation of the other requirements of the statute. Furthermore, the failure to pay the tax constitutes an absolute defense to an action to recover the purchase price of the stock.

21. Every person, firm, company, association or corporation engaged in whole or in part in the making or negotiating of sales, agreements to sell, deliveries or transfers of shares or certificates of stock, or conducting or transacting a stock brokerage business, shall within ten days after July 1, 1913, or within ten days after engaging in such business, file with the State Comptroller, either in Albany or New York City, a certificate setting forth the name under which such business is or is to be conducted or transacted and the true and real full names of the person or persons conducting or transacting the same, with the post-office address or addresses of said persons, or in the event of a change in the persons conducting such business or change of address, like certificate setting forth the facts shall within ten days thereafter be filed. Such certificate shall be duly acknowledged. A failure to perform this duty is a misdemeanor.

22. Every association, company or corporation who shall keep or cause to be kept within the State of New York a place for the sale, transfer or delivery of its stock shall within ten days after July 1, 1913, or within ten days after engaging in or maintaining a place for such business, file with the State Comptroller, either in Albany or New York City, a certificate setting forth the name of the company, the place of business and when and where incorporated, or in the event of a change in the persons or change of address like certificate setting forth the facts shall within ten days thereafter be filed. Such certificates shall be duly acknowledged by the president or secretary of the corporation. A failure to perform this duty is a misdemeanor.

(BILL OR MEMORANDUM OF SALE REQUIRED BY SECTION 270, TAX LAW.)

No.....

Date.....

NAME OF SELLER

ADDRESS

Sold to.....

(Stock to which it relates and number of shares)

HERE AFFIX AND CANCEL STAMPS

(CERTIFICATE TO BE FILED WITH THE COMPTROLLER BY STOCK BROKERS,
SECTION 275-a, TAX LAW.)

I hereby certify that the following named persons.....

(Here set forth full names and addresses)

are engaged in business as stock brokers under the trade name or style of
.....
at No....., in the city of
....., New York.

Dated....., 191..

STATE OF NEW YORK }
COUNTY OF..... } ss.:

On this.....day of.....,
191., before me, the subscriber, personally came.....,
to me known to be the person named in and who executed the foregoing
certificate and he duly acknowledges to me that he executed the same.

.....
Notary Public.

(CERTIFICATE TO BE FILED WITH THE COMPTROLLER BY ASSOCIATIONS AND CORPORATIONS, SECTION 275-a, TAX LAW.)

I,....., President of the
Secretary of the
.....
(Name of association or corporation)

do hereby certify that the said association keeps a place for the sale, transfer
corporation
or delivery of its stock at No....., in the city
of....., N. Y.

Incorporated....., Laws of the State of.....
.....
President.
Secretary.

STATE OF NEW YORK }
COUNTY OF..... } ss.:

On this..... day of..... 191.,
before me, the subscriber, personally came.....
to me known and who being by me duly sworn did depose and say that he is
the President of the..... corporation above
Secretary of the..... association
named and that he executed the foregoing on behalf of said corporation
association
pursuant to authority vested in him by a vote of the board of directors of
said corporation.
association.

.....
Notary Public.

TERMINAL ANNUITIES AND SINGLE PREMIUMS, WHOLE LIFE

Am. Ex. 5 per cent

AGE	AX	AGE	AX	AGE	IIx	AGE	IIx
10	16.50475	55	10.37017	10	166.4407	55	458.5633
11	16.46076	56	10.09472	11	168.5351	56	471.6801
12	16.41469	57	9.81450	12	170.7287	57	485.0235
13	16.36642	58	9.52988	13	173.0276	58	498.5768
14	16.31581	59	9.24127	14	175.4375	59	512.3205
15	16.26274	60	8.94928	15	177.9650	60	526.2248
16	16.20722	61	8.65445	16	180.6083	61	540.2642
17	16.14896	62	8.35742	17	183.3827	62	554.4086
18	16.08779	63	8.05876	18	186.2957	63	568.6310
19	16.02372	64	7.75900	19	189.3469	64	582.9048
20	15.95658	65	7.45885	20	192.5439	65	597.1978
21	15.88620	66	7.15921	21	195.8953	66	611.4659
22	15.81257	67	6.86074	22	199.4013	67	625.6789
23	15.73552	68	6.56420	23	203.0705	68	639.8004
24	15.65484	69	6.27048	24	206.9124	69	653.7863
25	15.57033	70	5.98022	25	210.9368	70	667.6088
26	15.48176	71	5.69422	26	215.1541	71	681.2272
27	15.38910	72	5.41286	27	219.5669	72	694.6255
28	15.29210	73	5.13592	28	224.1862	73	707.8131
29	15.19051	74	4.86279	29	229.0238	74	720.8198
30	15.08425	75	4.59264	30	234.0834	75	733.6839
31	14.97307	76	4.32477	31	239.3780	76	746.4392
32	14.85666	77	4.05856	32	244.9208	77	759.1162
33	14.73492	78	3.79392	33	250.7176	78	771.7182
34	14.60774	79	3.53109	34	256.7742	79	784.2337
35	14.47479	80	3.27017	35	263.1055	80	796.6584
36	14.33572	81	3.01349	36	269.7275	81	808.8814
37	14.19057	82	2.76062	37	276.6394	82	820.9229
38	14.03897	83	2.51052	38	283.8584	83	832.8324
39	13.88092	84	2.26066	39	291.3845	84	844.7301
40	13.71604	85	2.00986	40	299.2359	85	856.6738
41	13.54430	86	1.76061	41	307.4145	86	868.5428
42	13.36528	87	1.51750	42	315.9393	87	880.1201
43	13.17891	88	1.28611	43	324.8138	88	891.1386
44	12.98494	89	1.06704	44	334.0508	89	901.5688
45	12.78344	90	0.85453	45	343.6458	90	911.6885
46	12.57414	91	0.64497	46	353.6124	91	921.6672
47	12.35728	92	0.44851	47	363.9390	92	931.0234
48	12.13275	93	0.28761	48	374.6311	93	938.6849
49	11.90076	94	0.13605	49	385.6781	94	945.8987
50	11.66175	95	0.00000	50	397.0598	95	952.3973
51	11.41594			51	408.7648		
52	11.16361			52	420.7810		
53	10.90499			53	433.0958		
54	10.64036			54	445.6972		

The superintendent of insurance uses for computation of present values to be determined by him in pursuance of the provisions of the third paragraph of § 230 and the second paragraph of § 231, the foregoing table of "Terminal Annuities and Single Premiums, Whole Life. American Experience 5 per cent."

He also makes use of other tables of annuity and remainder values. The different computations sometimes necessary to be made are complicated and the explanation of them would form the basis of a substantial book on the subject. As these calculations are not made by the attorney, but are computed by the superintendent of insurance it hardly seems necessary to publish other than the first named table which will serve as an illustration of the method used.

Life estates

In this table the first two columns headed Ax are used for the computation of the present values of life estates.

For instance, the present value of a net life estate in \$25,000 to A, aged 49, is calculated by multiplying \$25,000 by 5%, and then multiplying the result of \$1,250 by 11.90076, thus obtaining \$14,875.95 as the present value of the life estate.

Remainders

The columns entitled IIX are used for the computation of the present value of remainders.

For instance, the present value of remainder in \$25,000, the life tenant being 49 years of age, is obtained by pointing off three points on the principal and then multiplying by 385.6781. Thus, $\$25,000 \times 385.6781 = \$9,641.95$, the present value of the remainder.

COMPENDIUM OF THE INHERITANCE TAX LAW AND PRACTICE

ARRANGED TOPICALLY IN ALPHABETICAL ORDER

With the exception of the several chapters dealing respectively with the Taxable Transfer, page 33, Rates of Tax and Exemptions, page 40, Procedure, page 54, and Non-Resident Estates, page 133, the law and practice of inheritance taxation is discussed topically in the following pages. The arrangement of the subjects in alphabetical order, and the system of cross references, have combined to do away with the conventional index.

In the case of decisions of the surrogates which do not appear in the reports, it has seemed advisable, in many instances, to give the opinion in full, rather than to attempt a digest which may omit a point salient to the exigencies of the matter the practitioner has in mind when he consults the opinion.

ACCOUNTING

Vide second sentence of § 236, *supra*, page 25, and Matter of Meyer, 209 N. Y. 386, *supra*, page 397.

ACCOUNTS RECEIVABLE

Vide Schedule A ⁵ *supra*, page 118 and Chose in Action, *post*, page 609.

ACCRUAL OF TAX

Vide Time of Tax, *post*, page 859.

ACCRUED INTEREST

Interest accrued to date of death is taxable. Matter of Hewitt, 181 N. Y. 547, *supra*, page 301.

Increase or interest after death is property of which decedent was not possessed at the time of his death, and is not subject to tax. Matter of Vassar, 127 N. Y. 1-8.

ACCRUED RIGHTS

Vide Remainders.

ACTS

PRESENT statute *supra*, page 3.

PRIOR statutes arranged chronologically, *supra*, page 403.

ADDITIONAL PAPERS

Surrogate, in his discretion, has right to deny application to submit additional papers. Matter of Wormser, 51 App. Div. 441-445. Vide Appeal, *post*, page 590.

ADMINISTRATION EXPENSES

Vide Schedule B² *supra*, page 125.

ADMINISTRATOR'S COMMISSIONS

Vide Schedule B², *supra*, page 125.

ADMISSION OF SERVICE

Admission of service of a notice of appeal to surrogate under § 232 by attorney of the state comptroller "cannot be accepted as a waiver of the default in appealing, for the validity of the appeal depended not upon the service thereof upon the attorney, but upon timely filing of the notice in the surrogate's office." Matter of Seymour, 144 App. Div. 151-152.

ADMISSION OF TESTIMONY

Vide Testimony, *post*, page 853.

ADOPTED CHILD

Any child "adopted as such in conformity with the laws of this state" is entitled to the five thousand dollar exemption and the minimum rates set forth in subdivision 1 of section 221a.

BURDEN OF PROOF is upon person claiming exemption. In Matter of Fisch, 34 Misc. 146-147, testator in his will left certain property to "my niece and adopted daughter." Surrogate Fitzgerald held that the mere recital in the will was not conclusive. "The only reference to the matter I find in the proofs attached to the report is contained in the affidavit of one of the daughters, wherein she furnishes the names of the legatees and devisees in the will, their places of residence and relationship. The evidence adduced to support a claim of exemption is insufficient."

ADOPTION not required to be under laws of this state, although the adoption must be "in conformity with the laws of this state." *Matter of Butler*, 58 Hun, 400, affirmed, without opinion, 136 N. Y. 649.

The present statute, subd. 1 of § 221a, does not differ in language as to adoption from the statute under consideration in *Butler* case, *supra*.

CHILD OF ADOPTED CHILD a lineal descendant of foster parent. *Matter of Cook*, 187 N. Y. 253-261, overruling, as to this point, *Matter of Fisch*, 34 Misc. 146-147.

WIDOW OF ADOPTED SON is a "widow of a son" within the meaning and intendment of those words as used in subd. 1 of § 221a. *Matter of Duryea*, 128 App. Div. 205; Domestic Relations Law, § 114.

PRIOR TO CHAP. 713, LAW 1887 an adopted child was not in exempt class. *Matter of Miller*, 110 N. Y. 216.

ADVANCEMENTS

Vide §§ 96 and 99 of Decedent Estate Law, *supra*, page 553.

Advancements claimed and not allowed in *Matter of Dormitzer*, N. Y. Law Journal, February 6, 1913, Surrogate Cohalan saying in his opinion: "The alleged advancement of \$26,000 made by the decedent to his son Walter was evidenced by a certain promissory note dated July 1, 1908, and payable on demand to the order of decedent, with interest at the rate of 5 per cent. per annum. The alleged advancement of \$30,000 to H. S. Dormitzer was evidenced by a collateral security note dated January 1, 1906, and payable on demand to the decedent, with interest at the rate of 6 per cent. per annum. These positive and unequivocal evidences of indebtedness to the decedent cannot be construed into advancements by the testimony given before the appraiser to the effect that the notes were given to the decedent after the loans or advancements had been made and without any intention on the part of the promissors or the decedent that the notes were to constitute an acknowledgment of indebtedness.

"The beneficiaries of the alleged advancements were the only persons who had knowledge of the negotiations which culminated in their receiving from the decedent the respective sums of \$26,000 and \$30,000. Therefore their interested testimony cannot, in view of the promissory note of the one and the collateral security note of the other, be regarded as such a

preponderance of evidence, as would justify the court in holding that the sums mentioned in the notes were advancements and not loans (Matter of Bennington, 67 Misc. 363; Bruce v. Griscom, 9 Hun, 280, aff'd 70 N. Y. 612). Upon this point the appeal is dismissed."

Vide etiam Matter of Bartlett, 4 Misc. 380; Ebeling v. Ebeling, 61 Misc. 537.

AGREED STATEMENT OF FACTS

Vide Submission of Controversy, *post*, page 652.

AGREEMENT BETWEEN PARTIES

Vide Matter of Cook, 187 N. Y. 253, and cases cited sub Compromise of Claim; etiam Antenuptial Contract; Gift; Partnership.

ALIEN

Vide Residence; Non-Resident; Treaty.

AMENDING DECREE

Vide Vacating Decree.

AMENDMENTS

The prior statutes are set forth *supra*, page 403, and the present statute, *supra*, page 3.

Vide cases cited sub Constitutionality; Exemptions; Legislative Declaration; Rates of Tax; Retroactive.

As to when death occurs on same day upon which statute is passed vide Matter of Dreyfous, 18 N. Y. Supp. 767; Matter of Lane, 157 App. Div. 694-697, *post*, page 809.

AMERICAN EXPERIENCE TABLES

Vide *supra*, page 580.

ANCIENT LAW

Vide Matter of McPherson, 104 N. Y. 306-317, *supra*, page 161.

ANCILLARY LETTERS

Vide § 228, *supra*, page 13.

Issuance of ancillary letters is not necessary. Matter of Fitch, 160 N. Y. 87, *supra*, page 231.

ANNUITIES

- | | |
|---|--|
| (1) Value of annuity. | (4) Annuity to executor and trustee. |
| (2) Theoretical not actual value. | (5) Tax on, payable forthwith. |
| (3) Where will directs purchase of annuity. | (6) Reservation of annuity to grantor. |

Vide Life Estate.

(1) Value of annuity

The value of an annuity is determined by the superintendent of insurance "by the rule, method and standard of mortality and value employed" by him "in ascertaining the value of policies of life insurance and annuities for the determination of liabilities of life insurance companies, except that the rate of interest for making such computation shall be five per centum per annum." Third paragraph of section 230. The practice is for the superintendent of insurance to make this calculation of value on the application of the surrogate. Section 231. In estates where there are annuities, the age of the annuitant at the death of the testator should be set forth in the papers filed with the appraiser.

As to tables used by superintendent of insurance vide *supra*, page 580.

(2) Theoretical not actual value

In Matter of Hall, 36 Misc. 618 (1901), testator, who died in 1889, left a life estate to his widow which life estate was not taxed until her death in 1900. He provided in his will that if the life estate was not sufficient to pay a certain fixed sum that the trustees should have power to invade the principal so as to bring the yearly income up to the sum designated by the testator. Surrogate Thomas in his opinion said: "The widow was sixty-nine years of age at the death of her husband, and at that time her chance of life was less than six years. She actually survived him about twice as long as that. The statute of 1887 (chap. 713) required a life estate sought to be taxed to be appraised on this theory, notwithstanding it resulted in error (Matter of Jones, 28 Misc. Rep. 356), but I do not find myself bound in this way in estimating the value of a legacy, now just due, and the actual value of which now appears without contradiction and is fixed by a decree. If the widow had lived long enough the estate would have been entirely consumed by her annuity, and a ruling which would require a tax to be imposed

against the residuary legatees, even if they had never been entitled to any sum whatever, should be avoided. * * * The valuations of the legacies now sought to be taxed as of the date of the death of the testator should be computed from the amounts adjudged in the decree on the final accounting as being their value at the date of the decree."

Matter of Jones, *supra*, affirmed 172 N. Y. 575, and Matter of White, 208 N. Y. 64, both held that the value of a life estate, for transfer tax purposes, is the theoretical one to be calculated by the superintendent of insurance under the provisions of section 230 and not the value based upon the actual duration of the life of the life tenant.

The first sentence of section 243 was amended by chapter 706, Laws of 1910, in effect July 11, 1910, to read: "The words 'estate' and 'property' as used in this article, shall be taken to mean the property or interest therein passing or transferred to individual or corporate legatees, devisees, heirs, next of kin, grantees, donees or vendees, and not as the property or interest therein of the decedent, grantor, donor or vendor." In Matter of White, *supra*, the testatrix died March 2, 1908. The first sentence of section 243 in force at her death read as follows: "The words 'estate' and 'property,' as used in this article, shall be taken to mean the property or interest therein of the testator, intestate, grantor, bargainor or vendor, passing or transferred to those not herein specifically exempted from the provisions of this article, and not as the property or interest therein passing or transferred to individual legatees, devisees, heirs, next of kin, grantees, donees or vendees." Chap. 368, Laws of 1905.

The legislature did not amend section 222, that section providing, *inter alia*: "Taxes upon the transfer of any estate, property or interest therein limited, conditioned, dependent or determinable upon the happening of any contingency or future event by reason of which the fair market value thereof cannot be ascertained at the time of the transfer as herein provided, shall accrue and become due and payable when the persons or corporations beneficially entitled thereto shall come into actual possession or enjoyment thereof." *

It may be that the Legislature in amending section 243 intended to return to the former principle that the law should not "tax a theory having no real substance behind it," and designedly intended to avoid the taxation of a transfer "theoret-

ically only an unsubstantial legal fabric." *Matter of Curtis*, 142 N. Y. 219-223.

It is the practice, however, to tax upon the basis of the theoretical and not the actual duration of life. *Vide* opinion of state comptroller, dated May 19, 1913, in *Matter of Peter D. Sidney*, Schoharie County, 2 State Department Reports, 505.

Prior to the amendment by chapter 76 of the Laws of 1899, in effect March 14, 1899, it was held in *Matter of Roosevelt*, 143 N. Y. 120, that the interests of annuitants and remaindermen were not liable to pay presently the inheritance tax when the annuitants and remaindermen "represent estates or interests, unvested and contingent, which, taken in connection with the life estate of the" life tenant, render the present value of the ultimate remainders unascertainable.

Where there is a life estate subject to annuities, there should be deducted from the present value of the life estate the present value of the annuities as arrived at by superintendent of insurance under § 230, and not the actual amount of principal necessary to produce the annuities at five per cent per annum. *Matter of Maresi*, 74 App. Div. 76-78.

(3) Where will directs purchase of annuity

Where, however, the will directs that annuities be purchased from life insurance companies the actual cost of the annuities determines the amount taxable, and not the value of the annuities as certified by the superintendent of insurance under § 230. *Matter of Hutchinson*, 105 App. Div. 487.

(4) Annuity to executor and trustee

Annuity to executor and trustee in addition to the commissions allowed by law held taxable under § 226, although it was to be "in full compensation for any and all services, legal or otherwise, which he shall render my estate." *Matter of Huber*, 86 App. Div. 458.

(5) Tax on, payable forthwith

Tax on annuity is payable forthwith out of the fund set aside for creating the annuity, and the tax so paid is restored to the fund by deducting from the periodical payments to the annuitant the proportionate part of such tax to be calculated by dividing the tax by the number of years the annuity will continue as determined by the superintendent of insurance under § 230. *Matter of Tracy*, 179 N. Y. 501-510.

(6) Reservation of annuity to grantor

Held not necessarily to make transfer taxable. *Matter of Edgerton*, 35 App. Div. 125, affirmed, without opinion, 158 N. Y. 671. Vide Gift and Trust Deed.

ANTE-NUPTIAL CONTRACT

A transfer of property by an ante-nuptial agreement is not taxable upon the theory that it is a contract made for the transfer of property in "contemplation of death" within the meaning of those words as used in subdivision 4 of section 220. As was said in *Matter of Baker*, 83 App. Div. 530-534, affirmed, on opinion below, 178 N. Y. 575, such a contract is entered into "in contemplation of life" rather than of death. Vide etiam *Matter of Craig*, 97 App. Div. 289-295, affirmed, on opinion below, 181 N. Y. 551.

Where no express ante-nuptial contract, transfer taxable. *Matter of Majot*, 199 N. Y. 29.

Ante-nuptial agreement to make will in favor of person does not make the transfer of property by will exempt from tax. *Matter of Kidd*, 188 N. Y. 274.

Surrogate Heaton of Rensselaer County in *Matter of Demers*, 41 Misc. 470, where decedent in 1862 had agreed that "upon his death the property he should have should belong to" a natural daughter, held that as the supreme court had decreed a specific performance of the contract, the appraiser was wrong in fixing a tax in decedent's estate.

It is difficult to reconcile the reasoning of these two cases; the *Demers* case, which was decided in 1903, follows the logic of the Appellate Division opinion (1906), 115 App. Div. 205, which was overruled in 188 N. Y. 274. A distinction may be drawn, however, because in the *Kidd* case the agreement was to leave the property by will, while in the *Demers* case the agreement was, the opinion states, that "upon his death the property he should have should belong to such child." It will be remembered that in both cases the agreement was made prior to the first inheritance tax statute of 1885.

Where the day after making ante-nuptial contract the parties entered into another agreement, it is to be presumed, in the absence of proof to the contrary, that the ante-nuptial contract was executed and the property set forth in it delivered on its date. *Matter of Miller*, 77 App. Div. 473.

ANTIQUES

Vide § 221*b supra*, page 43, as to when exempt.

Antiques should be set forth in Schedule A³ and appraisal by expert should be furnished, vide *supra*, page 108.

APPEAL

(1) To Surrogate.

(2) To Appellate Division.

(3) To Court of Appeals.

(4) To United States Supreme Court.

Vide Vacating Decree.

When those directly concerned acquiesce and do not appeal, executors or administrators have no authority to take appeal. *Isham v. N. Y. Assn. for Poor*, 177 N. Y. 218-222. *Contra Matter of Cornell*, 66 App. Div. 162-171, modified on other points, 170 N. Y. 423.

Accepting payment does not estop comptroller from appealing. *Matter of Bogert*, 25 Misc. 466. *Vide Payment of Tax*.

Limited to review of part appealed from, as stated in notice of appeal to surrogate under § 232. *Matter of Davis*, 149 N. Y. 539; *Matter of Manning*, 169 N. Y. 449; *Matter of Cook*, 194 N. Y. 400; *Matter of Wormser*, 51 App. Div. 441-445; *Matter of Kennedy*, 93 App. Div. 27-30.

Appeal dismissed because notice of appeal did not state the grounds of appeal. *Matter of Stone*, 56 Misc. 247.

In *Matter of Westurn*, 152 N. Y. 93-104, the Court say: "We think the statute ought to be construed so as to permit the raising upon an appeal, of a question which did not enter into the original determination, and which was first made known after the appeal had been taken, and after the expiration of the sixty days. The surrogate had jurisdiction of the appeal by the notice actually given, and it would be an unwise construction of the act to limit the hearing so as to exclude the consideration of a new question subsequently arising, on the ground that it was not specified in the notice of appeal." As to modification of decree by surrogate under powers conferred upon him by provisions of subd. 6 of § 2481 of Code of Civil Procedure vide cases cited sub Vacating Decree.

(1) To Surrogate

The surrogate makes an order under § 231 "as of course," and under § 232 an appeal is taken to the surrogate from his

own order. In other words, an appeal is taken from the surrogate acting as a taxing officer to the surrogate acting in his judicial capacity. Matter of Costello, 189 N. Y. 288-290.

Notice of appeal to surrogate under § 232 must be filed in the office of the surrogate within sixty days from the fixing, assessing and determination of the tax. "The admission of service of the notice of appeal by the attorney of the State Comptroller cannot be accepted as waiver of the default in appealing, for the validity of the appeal depended not upon service of notice thereof upon the attorney, but upon timely filing of the notice in the surrogate's office." Matter of Seymour, 144 App. Div. 151-152. Vide § 784 of Code of Civil Procedure.

Appeal must be taken within the sixty-day period of § 232 although the surrogate has not performed his statutory duty under § 231 of giving notice of the tax. Matter of Connelly, 38 Misc. 466-470.

It is the practice, at times, for the surrogate not to make the *pro forma* order under § 231 but to remit the report of the appraiser back to him for additional proof, and he can do this although point raised that objections to report can only be taken on appeal from *pro forma* order. Matter of Kelly, 29 Misc. 169-170. Vide Surrogate, *post*, page 848.

Surrogate may take new testimony upon appeal from his *pro forma* order. Matter of Westurn, 152 N. Y. 93-104; Matter of Thompson, 57 App. Div. 317; Matter of Bentley, 31 Misc. 656-657; Matter of Gibbs, 60 Misc. 645.

Rehearing refused where on appeal from *pro forma* order, the comptroller fails to show that he can produce any evidence which will bring about any different result. Matter of Johnson, 37 Misc. 542.

Where an error of law is claimed to have been committed the remedy is not an application to Supreme Court for a reappraisal under § 232, but an appeal to the surrogate under the same section. Matter of Niven, 29 Misc. 550.

Surrogate's decree final and conclusive upon all questions, both of law and fact, presented to him for adjudication unless an appeal is taken. Matter of Wolfe, 137 N. Y. 205; Matter of Lansing, 31 Misc. 148-154; Matter of Crerar, 56 App. Div. 479. The adjudication of the surrogate in a transfer tax proceeding is "binding upon the question of taxation only." Amherst College *v.* Ritch, 151 N. Y. 332-343.

(2) To Appellate Division

An appeal may be taken under § 2570 of Code of Civil Procedure from order involving a substantial right. *Morgan v. Warner*, 162 N. Y. 612; *Matter of Hull*, 109 App. Div. 248-250.

Appeal direct to Appellate Division from order of surrogate made "as of course" under § 231 is not proper; the appeal to Appellate Division can be taken only from the order of the surrogate made after the appeal to him under § 232. *Matter of Costello*, 189 N. Y. 288-291; *Matter of Vietor*, 159 App. Div. 000.

By § 2572 of Code appeal to Appellate Division must be taken within thirty days after the service of a copy of order, and notice of entry thereof. If appeal is taken by a person who was not a party, it must be taken within three months after the entry of the order. *Matter of Dingman*, 66 App. Div. 228-231.

If order is silent as to grounds on which it is made, it is presumed to reverse surrogate on question of law only. *Matter of Davis*, 184 N. Y. 299.

Discretion of surrogate in refusing to resettle his order, will not be reviewed by Appellate Division as "it is not for this court to direct or control him in the exercise of his discretion." *Matter of Sondheim*, 69 App. Div. 5.

IN *MATTER OF CAROLINE W. ASTOR* the surrogate remitted the report to the appraiser for further information. The executors of the estate appealed from the order remitting the report. The attorneys for the estate argued that the surrogate had no power to remit the report, while the attorney for the comptroller contended that the order was not appealable under § 2570 of the Code of Civil Procedure. The appeal was dismissed, 137 App. Div. 922. Opinion of surrogate quoted, *supra*, page 107.

(3) To Court of Appeals

If the order of the Appellate Division does not recite that the reversal was upon the facts then the Court of Appeals will assume that the reversal was made solely on the law, and the facts as found below will be undisturbed provided there is any evidence to support them. *Matter of Brandreth*, 169 N. Y. 437-440; § 1338 of Code of Civil Procedure.

In *Matter of Thayer*, 193 N. Y. 430-433, the court say: "The valuation of the stock is a question of fact. The decision of the surrogate on this question of fact has been unanimously affirmed by the Appellate Division, and, as it involves no error of law, it is conclusive in this court."

Limited to a review of questions of law only. *Matter of Thorne*, 162 N. Y. 238; *Matter of Mahlstedt*, 171 N. Y. 652; Code of Civil Procedure, §§ 191, 1337.

Dismissed where not from final order. *Matter of Bishop*, 188 N. Y. 635; *Matter of Browne*, 195 id. 522; *Matter of Vivanti*, 200 id. 513. Code, subdv. 1, § 190.

Where matter rested with discretion of surrogate the Court of Appeals will not interfere. *Matter of Cornell*, 172 N. Y. 423-426, *supra*, page 259.

(4) To United States Supreme Court.

A right under the United States Constitution must be specially set up and claimed, § 709, U. S. Rev. Statutes. *Matter of Houdayer*, 150 N. Y. 37, writ of error dismissed in 175 U. S. 32, sub nom. *Scudder v. Comptroller*; *Matter of Tilt*, 182 N. Y. 557, reversed in 207 U. S. 43, sub nom. *Tilt v. Kelsey*; *Matter of Stickney*, 185 N. Y. 107, writ of error dismissed in 209 U. S. 419, sub nom. *Stickney v. Kelsey*.

APPOINTMENT

Vide Power of Appointment.

APPORTIONMENT OF PROPERTY

- | | |
|---------------------------|--------------------------------|
| (1) Of corporations. | (3) Decisions relative to life |
| (2) Of decedent's assets. | tenant and remaindermen. |

(1) Of corporations

Will be made of property of corporation incorporated in New York and other states in estates of non-residents. *Matter of Cooley*, 186 N. Y. 220; *Matter of Thayer*, 193 N. Y. 430.

Also as to joint stock associations. *Matter of Willmer*, 153 App. Div. 804.

Will not be made of New York corporations. *Matter of Palmer*, 183 N. Y. 238.

These decisions were all rendered prior to chap. 732, laws 1911, in effect July 21, 1911, which so amended sections 220 and 243 as to make stock held by non-resident decedent not taxable.

(2) Of decedent's assets

Sections 2712 and 2720 of Code of Civil Procedure deal with the question as to what shall be deemed assets of the estate.

Dividends declared before death of decedent but payable

after are part of decedent's estate. *Matter of Kernochan*, 104 N. Y. 618.

A dividend declared before death but made payable to stockholders of record at a date subsequent to death of decedent raises a question which does not seem to have been passed upon.

(3) Decisions relative to life tenant and remaindermen

For decisions as to apportionment of dividends between life tenant and remainderman vide *Robertson v. de Brulatour*, 188 N. Y. 301; *Thayer v. Burr*, 201 N. Y. 155; *Matter of Harteau*, 204 N. Y. 292; *Matter of Osborne*, 153 App. Div. 312; *Matter of Cooper*, 82 Misc. 324.

APPRAISAL

- | | |
|----------------------------------|---|
| (1) Time of appraisal. | (4) Cannot make appraisal on suspicion. |
| (2) Actual sale. | |
| (3) State entitled to appraisal. | (5) Each trust estate should be separately appraised. |

The subject of appraisal of an estate is discussed, *supra*, page 82. Vide etiam *Reappraisal post*, page 814. *

(1) Time of appraisal

The transfer tax proceeding need not be taken immediately after death. The court in *Matter of Westurn*, 152 N. Y. 93-101 said that it would be prudent to defer the appraisal "for the period necessary to enable the executor or administrator to advertise for claims."

But it is not necessary to wait for a final accounting. *Matter of Vassar*, 127 N. Y. 1-8.

The practice varies, but it is evident that the appraisal should be deferred until the assets and liabilities of the estate are marshalled by the representatives of the estate. Otherwise delay and trouble are caused by reason of the representatives of the estate not being able to make a clear statement as to the condition of the estate.

For discount and interest provisions of section 223 vide *Payment of Tax*.

In *Matter of Jones*, 54 Misc. 202 (1907) the testator died in 1888, but transfer tax proceedings were not taken until 1898. Over eight years after the order was made assessing the tax, a motion was made to set aside the order "because the proceeding to tax was not instituted immediately, or within a reasonable

time, after the death of decedent." The surrogate denied the motion.

(2) Actual Sale

ACTUAL SALE at best obtainable price overcomes appraisal by expert. *Matter of Arnold*, 114 App. Div. 244.

AFTER APPRAISAL and decree entered, subsequent sale at a sum less than appraised value will not justify surrogate in modifying decree to conform with the sale price. *Matter of Lowry*, 89 App. Div. 226; *Matter of Meyer*, 209 N. Y. 386, and other cases cited *Vacating Decree*, page 878.

(3) State entitled to appraisal

Surrogate gave his opinion that estate was not liable to taxation, but entered no order. Several years later the comptroller applied for an appraisal, and the surrogate held, "that no official appraisal has ever been made and it is to this that the state is entitled whether the result shows a tax due or not." *Matter of Schmidt*, 39 Misc. 77.

APPRAISAL MAY BE COMPELLED by mandamus against surrogate. *Matter of Kelsey v. Church*, 112 App. Div. 408.

(4) Cannot make appraisal on suspicion

"Any apparent attempt upon the part of the executors to evade the payment of a just tax, however reprehensible it may be, does not authorize either the appraiser or the surrogate to make an assessment upon suspicion or otherwise than upon convincing evidence of the transfer of property for which the tax is imposed by the statute." If the witnesses refuse to answer material questions the proper remedy is to make application to surrogate to punish for contempt. *Matter of David Kennedy*, 113 App. Div. 4-8.

(5) Each trust estate should be separately appraised

Matter of Vanderbilt, 172 N. Y. 69-73.

APPRAISER

(1) Functions of an appraiser.

(3) Supreme court may appoint.

(2) Report of appraiser.

COUNTY TREASURER acts as appraiser (section 230) except in the seventeen counties of Albany, Bronx, Dutchess, Erie, Kings, Monroe, Nassau, New York, Niagara, Oneida, Onon-

daga, Orange, Queens, Rensselaer, Richmond, Suffolk and Westchester. Section 229.

Section 230 provides that "the surrogate, either upon his own motion or upon the application of any interested person, including the state comptroller, shall by order direct the person or one of the persons appointed pursuant to section 229 of this article in counties in which the office of appraiser is salaried and in other counties, the county treasurer, to fix the *fair market value* of property of persons whose estates shall be subject to the payment of any tax imposed by this article."

DUTIES of an appraiser as defined by statute, vide page 82.

The surrogate may himself act without appointing an appraiser, section 231 stating that the surrogate may "determine the *cash value* of all such estates and the amount of tax to which the same are liable, without appointing an appraiser."

In subdivision 7 of section 220 the statute uses neither the words "fair market value" of section 230 nor "cash value" the language of section 231. It reads: "The tax imposed hereby shall be upon the *clear market value* of such property, at the rates hereinafter prescribed." It would seem that the legislature did not intend that the words "clear market value," "fair market value," and "cash value" should be other than synonymous.

Surrogate "upon his own motion," may under § 230, appoint an appraiser. Matter of O'Donohue, 44 App. Div. 186; Matter of Lansing, 31 Misc. 148-149.

Appraiser cannot be designated by surrogate in counties set forth in section 229 unless he is one of the appraisers appointed by the state comptroller. Matter of Sondheim, 32 Misc. 296, affirmed, 69 App. Div. 5. The comptroller may at pleasure remove an appraiser. People ex rel. McNeile v. Glynn, 128 App. Div. 257; People ex rel. McKnight v. Glynn, 56 Misc. 35. The position of appraiser is not under civil service. Matter of Weeks v. Kraft, 147 App. Div. 403.

(1) Functions of an appraiser

"He must have a knowledge of trusts and of wills, and devises and bequests, and of the descent and distribution of property of decedents. He must be an expert upon the value of stocks and bonds and personal property in general. He must be capable of ascertaining the value of real property and of conducting examinations and deciding questions of fact as to

residence, relationship and the like." *Matter of Weeks v. Kraft*, 147 App. Div. 403-410.

In *Matter of Barnes*, N. Y. Law Journal, December 17, 1913, Surrogate Fowler said, *inter alia*:

"The practice adopted by the appraisers in the appraisal of estates has always been in accordance with the assumption that the statute gave them jurisdiction, in the first instance, to pass upon all questions arising in connection with the ascertainment of the value of taxable interests of a resident citizen of the State. This appears a rational and orderly construction of the statute, if we have regard to the adjudicated cases. In the *Matter of Kelsey v. Church*, 112 App. Div. 408, it was said that the facts concerning the taxability of an estate do not have to be established before an appraiser is appointed, and the surrogate cannot wait before appointing an appraiser in order to judicially determine whether the estate is subject to taxation. From this it may be inferred that the question whether the property is or is not subject to taxation, is to be determined, in the first instance, by the appraiser who has been duly appointed by the surrogate for that purpose. In *Matter of Kennedy*, 113 App. Div. 4, it appeared that the decedent had about \$700,000 a few years before his death. His executors were interrogated by the appraiser as to this property and they refused to answer. It was assessed as a part of his estate; an appeal was taken to the Appellate Division, and it was said by that court that the executors who refused to answer were contumacious and could be punished for contempt. If they could be punished for refusing to answer questions put to them by the appraiser in regard to property which a deceased resident was alleged to have possessed several years before his death, the appraiser must have had jurisdiction to ask the questions, because if there was no jurisdiction on the part of the appraiser to make the inquiry there could be no contempt on the part of the witnesses who refused to answer the extrajudicial questions. In *Matter of Ullmann*, 137 N. Y. 407, it was said that 'every officer charged with the duty of executing the taxing power, whether it be a surrogate or a town assessor, must necessarily decide in a judicial capacity important questions of law in order to perform the duties of his office.' This language is broad enough to include the appraiser as well as the surrogate. And in *Matter of Costello*, 189 N. Y. 288, it was held that an appeal would not lie to the Appellate Division from the formal order

entered upon the appraiser's report, but that an appeal should first be taken to the surrogate acting judicially. * * *

"It is alleged that the transfer tax appraiser always acts as a representative of the State Comptroller rather than as a disinterested arbiter. This, if true, is a violation of the obligations of the appraiser and not contemplated by the act. AN APPRAISER SHOULD DECIDE WITH ENTIRE IMPARTIALITY THE QUESTIONS ARISING BEFORE HIM, WHETHER OF LAW OR OF FACT OR MIXED QUESTIONS OF LAW AND FACT.

"The State Comptroller is only one of the parties to the proceeding before the appraiser, and is entitled to no more consideration than the representatives of the estate. An error of the appraiser in this regard cannot enter into the construction of the statute. The surrogate may always correct such errors, if duly advised."

"The powers and duties of the tax appraisers are of a *quasi* judicial character. They call for the exercise of sound judgment, discretion and knowledge of legal principles. They demand upon the part of the incumbent an understanding of statutory provisions and ability to pass upon complicated questions of law.

"The appraiser has power to issue subpoenas and compel the attendance of witnesses. His powers and acts partake of the nature of the acts, powers and duties of commissioners appointed by the court in condemnation proceedings and of referees appointed by the court to hear, try and determine the issues in actions, or to take proof in actions and report the same to the court with their opinion thereon. The office is in no sense a subordinate position; and the comptroller who appoints the appraiser has no power to review his acts, or in any way control them. The only right to review his acts is vested, by statute, in the surrogate of the county in and for which the appraiser is appointed. The office is not a position in the comptroller's nor in the surrogate's office, but is an independent office, separate and distinct from any other." *People ex rel. McKnight v. Glynn*, 56 Misc. 35-39. *Vide etiam*, *Matter of Ullmann*, 137 N. Y. 403-407, *supra*, page 181.

"The appraiser has no power to determine the domicile of the decedent." *Matter of Grant*, N. Y. Law Journal, November 14, 1913, opinion quoted, *post*, page 833.

"Some of the functions of a taxing officer are ministerial, but it is well established by authority that in determining the

value of the property assessed, the extent of claims to exemption, etc., the taxing officer or board acts judicially." *Matter of Hull*, 109 App. Div. 248.

"Function of an appraiser is somewhat similar to that of a jury called by the court in an equity case to aid its conscience. The whole matter is with the surrogate and continues with him until final determination after appeal." *Matter of Thompson*, 57 App. Div. 317-319.

Must rule on admission of testimony. *Morgan v. Warner*, 45 App. Div. 424-427, affirmed, on opinion below, 162 N. Y. 612. *Vide* cases cited sub Testimony.

May construe will. *Matter of Cager*, 111 N. Y. 343-347; *Matter of Ullmann*, 137 N. Y. 403; *Matter of Curtis*, 142 N. Y. 219; *Matter of Kimberly*, 150 N. Y. 90; *Matter of Burgess*, 204 N. Y. 265; *Matter of Lynn*, 34 Misc. 681; *Matter of Peters*, 69 App. Div. 465.

(2) Report of appraiser

Report of appraiser may be remitted back for the purpose of obtaining additional proof. *Matter of Kelly*, 29 Misc. 169-170.

Order remitting report for additional evidence was appealed from and the Appellate Division dismissed appeal on ground that order was not appealable under § 2570 of Code of Civil Procedure. *Matter of Astor*, 137 App. Div. 922.

Report should be made clearly to express that it embraces all of the property which may be taxed at the date of the death of decedent. *Matter of Earle*, 74 App. Div. 458.

"That which is to be reported by the appraiser is the value of the interest passing to the beneficiaries" "without any deduction for any purpose, or under any testamentary direction." *Matter of Swift*, 137 N. Y. 77-87.

It is now the practice for the appraiser to report the gross amount of the estate and also the deductions allowed.

It is the practice for the appraiser to receive such competent evidence as may be submitted to him to establish claims for deductions and when his report is submitted to the surrogate under section 230 the surrogate adopts the conclusions of the appraiser relative to the deductions when he comes to enter his *pro forma* order under section 231, unless they are palpably improper. *Matter of A. J. Wormser*, 36 Misc. 434. Appeal may be taken from *pro forma* order, *vide* Appeal.

Each trust estate created should be separately set forth and appraised. *Matter of Vanderbilt*, 172 N. Y. 69-73.

When a temporary order is to be entered under the provisions of the sixth paragraph of § 230, *supra*, page 18, the report should set forth the necessary facts; vide footnote to *Matter of Brez*, 172 N. Y. 609, *supra*, page 273.

(3) Supreme court may appoint

Under the provisions of § 232 an appraiser may be appointed by Supreme court. Vide Reappraisal.

ARCHBISHOP

Vide Bishop.

ASSETS

Vide Schedules of Assets, *supra*, page 96.

ASSIGNMENT BY LEGATEE

Vide Election.

ATTEMPT TO EXERCISE POWER OF APPOINTMENT

Vide Power of Appointment.

ATTORNEY GENERAL

Composition of tax in certain estates "by and with the consent of the attorney general expressed in writing." Section 233. For discussion of section vide *Matter of Kidd*, 115 App. Div. 205-207, reversed 188 N. Y. 205.

AVOIDING TAX

Vide Election; Evasion of Tax.

BANK DEPOSIT

(1) Waiver.

(2) Resident.

(3) Non-resident since 1911 amendment.

(4) Prior to 1911 amendment in non-resident estate.

Vide Property Held Jointly or in Trust.

(1) Waiver

Bank deposits should be set forth in Schedule A², *supra*, page 103.

For application for waiver under § 227 vide *supra*, page 69.

(2) Resident

A bank deposit of a resident decedent is subject to the tax no matter whether it is in a New York or a foreign bank. Subds. 1 and 4 of § 220 and § 243. The same is true as to a certificate of deposit. It should be remembered, however, that the transfer may be exempt under the provisions of § 221 by reason of the beneficiary being included in the exempted class of said § 221, or it may be exempt because the total property passing from the decedent to the particular beneficiary is less than the exempted amount provided for in § 221a.

Deposit in bank which has been closed, *vide supra*, page 104.

(3) Non-resident since 1911 amendment

In estates of non-residents bank deposits have not been taxable since the amendment by chap. 732, Laws of 1911, in effect July 21, 1911. Subds. 2 and 4 of § 220 and § 243. Under the original Act of 1885 it was held that the property of a non-resident decedent was not subject to the tax. *Matter of Enston*, 113 N. Y. 174.

(4) Prior to 1911 amendment in non-resident estate

From the amendment by chap. 713, Laws of 1887, in effect June 25, 1887, to the 1911 amendment the property of a non-resident situated within the state has been subject to the tax. *Matter of Romaine*, 127 N. Y. 80. Subsequent to the *Romaine* case, *supra*, it was held that a New York bank deposit of a non-resident decedent was subject to the tax. *Matter of Blackstone*, 171 N. Y. 682, sustained in 188 U. S. 189, sub nom. *Blackstone v. Miller*; *Matter of Daly*, 100 App. Div. 373-381, affirmed, without opinion, 182 N. Y. 524. Before 1911 amendment certificates of deposit in New York bank, although certificate physically without the state at time of non-resident's death, held, taxable. *Matter of Hewitt*, 181 N. Y. 547, *post*, page 301; *Matter of Fearing*, 138 App. Div. 881-883, *supra*, page 374, affirmed, 200 N. Y. 340.

As to the jurisdiction of a surrogate in non-resident cases prior to amendment by chap. 399, Laws of 1892, in effect May 1, 1892, *vide Matter of Embury*, 19 App. Div. 214, affirmed, without opinion, 154 N. Y. 746 and *Matter of Pettit*, 65 App. Div. 30, affirmed, on opinion below, 171 N. Y. 654. As to the jurisdiction after the 1892 amendment, *vide Matter of Fitch*, 160 N. Y. 87; *Matter of Hubbard*, 21 Misc. 566.

BENEFICIARY

Beneficiaries and their interests should be set forth in Schedule D, *supra*, page 94.

As to evidence by, vide cases cited sub TESTIMONY, *post*, page 855.

Residence of beneficiary is immaterial. Matter of Green, 153 N. Y. 223-228, *supra*, page 216; Matter of Dingman, 66 App. Div. 228.

BENEVOLENT CORPORATIONS

Exempt under first sentence of § 221, *supra*, page 40. Vide Exemptions.

BIBLE

Corporations organized exclusively for bible or tract purposes are exempt under first sentence of § 221, *supra*, page 41. Vide Exemptions.

BISHOP

Bishop exempt under § 221 although a non-resident. Matter of Palmer, 158 N. Y. 669; Matter of McCartin, N. Y. Law Journal, December 5, 1913, opinion quoted, *post*, page 608.

Archbishop as well as cardinal archbishop held to be within meaning of the word "bishop" as used in § 221. Matter of Kelly, 29 Misc. 169-171; Church of the Transfiguration *v.* Niles, 86 Hun, 221.

BLANKET MORTGAGE

Vide Matter of Tremberger, N. Y. Law Journal, March 7, 1912, opinion quoted *post*, page 659, and same case, N. Y. Law Journal, October 31, 1913, opinion quoted page 661.

BLOCK OF STOCK

Vide page 115.

BONA FIDE PURCHASER

Vide Lien of Tax.

BOND AND MORTGAGE

Vide Mortgages.

BONDS

- | | |
|---|--------------------------------|
| (1) Waiver. | (4) Prior to 1911 amendment in |
| (2) Resident. | non-resident estate. |
| (3) Non-resident since 1911
amendment. | |

(1) Waiver

Bonds should be set forth in Schedule A⁴, *supra*, page 124. For application for waiver under § 227 vide page 69.

(2) Resident

In the estate of a resident decedent bonds are subject to the tax no matter whether they are bonds of a domestic or a foreign corporation, even though the bonds are physically located outside the State of New York at the time of decedent's death. Subds. 1 and 4 of § 220 and § 243.

United States bonds are subject to the tax. *Plummer v. Coler*, 178 U. S. 115.

(3) Non-resident since 1911 amendment

In non-resident estates bonds have not been taxable, even though physically located within the State at the time of decedent's death, since the amendment of subds. 2 and 4 of §§ 220 and 243 by chap. 732 of the Laws of 1911, in effect July 21, 1911.

(4) Prior to 1911 amendment in non-resident estate

Under the Act of 1885 it was held that bonds and other property of non-residents were not taxable. *Matter of Enston*, 113 N. Y. 174.

Under the Act of 1887 it was held that in a non-resident's estate bonds of a foreign corporation were not subject to the tax although physically kept within the State. *Matter of Gibbes*, 84 App. Div. 510, affirmed, without opinion, 176 N. Y. 565. In construing the 1887 Act it was held that United States bonds were bonds of a foreign corporation and not taxable under said Act in the estate of a non-resident. *Matter of Schermerhorn*, 50 Misc. 233. Vide *United States Bonds*, *post*, page 876.

From the amendment by chap. 399, Laws of 1892, in effect May 1, 1892, to the 1911 amendment bonds of a foreign corporation physically located within the State of New York were taxable in a non-resident's estate. *Matter of Whiting*, 150 N. Y. 27; *Matter of Morgan*, 150 *id.* 35.

Bonds of a New York corporation owned by a non-resident

decendent were not taxable unless physically located within the State of New York at the time of the non-resident's death. Matter of Bronson, 150 N. Y. 1. Similar ruling as to bonds and mortgages upon New York real estate. Matter of Fearing, 200 N. Y. 340; Matter of Preston, 75 App. Div. 250.

Non-resident decendent was stockholder in foreign corporation, and as such had right to certain bonds to be issued in New York. Held, not taxable as the title to the bonds was in the foreign corporation. Matter of Hillman, 116 App. Div. 186.

BOOK VALUE

"Prima facie the book value is evidence against the holder of stock. The presumption may be rebutted by proof of 'market value.'" Matter of Valentine, N. Y. Law Journal, December 4, 1913, opinion quoted, *post*, page 622.

BOOKS

Books should be set forth in Schedule A³ and appraisal should be furnished, *supra*, page 106.

Vide § 221*b* as to when exempt.

BOSTON & ALBANY R. R. CO.

Prior to amendment of §§ 220 and 243 by chap. 732, Laws of 1911, in effect July 21, 1911, stock held by non-resident's estate in Boston & Albany Railroad Company was taxed on $\frac{1887}{10000}$ basis. Matter of Cooley, 186 N. Y. 220; Matter of Thayer, 193 N. Y. 430.

Stock defined as intangible property (§ 243) and not taxable in non-resident's estate since 1911 amendment.

BROKER'S COMMISSIONS

Vide, Schedule B² *supra*, page 128.

BROTHER

Entitled to five thousand dollars exemption and the lower rates of subd. 1 of § 221*a*; *supra*, page 45.

BURDEN OF PROOF

- | | |
|--|---------------------------------|
| (1) When burden is on state comptroller. | (2) When burden is on claimant. |
|--|---------------------------------|

Vide Testimony.

(1) When burden is on state comptroller

As inheritance tax is a special and not a general tax the burden of proof rests with the state to bring the transfer within the

terms of the statute. *Matter of Enston*, 113 N. Y. 174-178; *Matter of Thorne*, 44 App. Div. 8-10, appeal dismissed 162 N. Y. 238; *Matter of Miller*, 77 App. Div. 473-480; *Matter of Kennedy*, 113 App. Div. 4-6.

PRIMA FACIE CASE entirely uncontradicted sustains burden of proof. *Matter of Lane*, 39 Misc. 522.

Where circumstances of the case led the court to hold that a transfer absolute on its face was in reality merely for purpose of giving transferee custody and management thereof, the burden of proof may be sustained by circumstantial evidence. "Such circumstantial evidence may overbear the positive testimony of an interested party who swears to the contrary." *Matter of Palmer*, 117 App. Div. 360-368; *Matter of Price*, 62 Misc. 149-152. In *Matter of Ahrens*, N. Y. Law Journal, May 10, 1913, opinion quoted sub Contemplation of Death, the surrogate said: "The burden of proving that the gift was made in contemplation of death was upon the state comptroller (*Matter of Palmer*, 117 App. Div. 360); and while the nature of the case rendered it exceedingly difficult for him to obtain direct and positive proof, he could by an intelligent cross-examination of the witnesses produced on behalf of the estate have obtained some evidence of the material facts."

On appeal to surrogate from *pro forma* order comptroller sought to have rehearing for purpose of revaluation of stock, which was denied, the surrogate saying, "There is nowhere contained in appellant's papers a specific fact, or statement of any person competent to judge that this stock is worth one dollar more than the sum for which it has been appraised." *Matter of Johnson*, 37 Misc. 542.

DISCOVERY OF NEW FACTS must be shown by comptroller to entitle him to order appointing appraiser to value asset the valuation of which in a previous appraisal had been suspended. *Matter of De Sala*, N. Y. Law Journal, July 20, 1912.

Executrix claimed that contents of certain pocketbook belonged to her and not to her husband, the decedent. The appraiser held that the securities were taxable in husband's estate. Surrogate Cohalan overruled the appraiser, *Matter of Harry M. Francis*, N. Y. Law Journal, August 12, 1913, opinion quoted sub Ownership of Property, page 749, on ground that comptroller had failed to sustain the burden "imposed on him of showing that the property was subject to the provisions of the Transfer Tax Law."

FRAUDULENTLY CONCEALED ASSETS. Burden is upon comptroller to show that executor concealed from appraiser certain assets and "in the absence of such convincing evidence the court will not vacate its order entered more than four years ago." *Matter of Peck*, 149 App. Div. 912.

SAVINGS BANK ACCOUNT in name of decedent in trust for his son casts upon comptroller burden of showing that transfer was made in contemplation of death where bank book has been delivered to *cestui que trust*. *Matter of Mathew Farrell*, N. Y. Journal, January 3, 1912, opinion quoted page 797.

PUBLIC ADMINISTRATOR'S affidavit held to be "insufficient to warrant the court in vacating the order assessing tax heretofore entered upon his petition. If evidence which he has since discovered shows that the decedent died prior to the enactment of the Inheritance Tax Laws of this State he should state the nature of this evidence and the source of his information. The application to vacate the order fixing tax will be denied, with leave to renew upon papers containing allegations as herein indicated." *Matter of Mary Bernard*, N. Y. Law Journal, November 28, 1911.

(2) When burden is on claimant

ADVANCEMENTS were claimed in *Matter of Dormitzer*, N. Y. Law Journal, February 6, 1913, opinion quoted sub Advancements, and it was held that claimant had not sustained burden of proof.

Burden of proof is upon beneficiary claiming under § 221a, subd. 1 on ground of mutually acknowledged relationship of parent and child. *Matter of Davis*, 98 App. Div. 546-549, reversed in 184 N. Y. 299 but not on this point. *Matter of Birdsall*, 22 Misc. 180-187, affirmed, without opinion, 43 App. Div. 624. Beneficiary is a competent witness. *Matter of Brundage*, 31 App. Div. 348-352, and cases cited re § 829 of Code of Civ. Pro. sub **TESTIMONY**.

DEDUCTIONS sought must be shown to be necessary or proper expense of administration to which the legal representatives of the estate will be entitled to be credited on their accounting. *Matter of Thomas*, 39 Misc. 223.

FOREIGN DECREES and proceedings for which full faith and credit are claimed by representative of estate should be proved, and until proof is made it is not incumbent upon the state comptroller either to attack the jurisdiction of the foreign court

or to prove the law of the state. *Matter of Cummings*, 142 App. Div. 377-386.

Surrogate Fowler in *Matter of Loewi*, 75 Misc. 57, held that "where the beneficiaries of decedent's bounty claim exemption from taxation upon the ground that the property passed to them as a gift from the decedent," the court will require "on part of the donees or beneficiaries satisfactory and convincing proof that such gifts were made *inter vivos* with the intent to pass title at the time of making the alleged gift. If such evidence on the part of the beneficiaries does not show to the satisfaction of the court that all the essential requirements necessary to the validity of a gift *inter vivos* have been fully complied with, no presumption in favor of such gifts will be indulged in, and the property will be held to pass either as a gift in contemplation of death or intended to take effect in possession or enjoyment at or after death."

Testatrix forgave one-half of notes held against her brother's estate, and the executrix of her estate collected the half not forgiven. The surrogate took the position that the burden was upon the estate "to show that the fair market value of the one-half of such claims was not one-half of the face value of the notes, with interest." *Matter of Wood*, 40 Misc. 155-156.

RECITAL IN WILL that beneficiary is an adopted daughter, does not relieve from burden of proof to establish adoption. *Matter of Fisch*, 34 Misc. 146.

BURIAL EXPENSES

Schedule B¹, *supra*, page 124.

BUSINESS OF DECEDENT

Vide Good Will, *post*, page 706; etiam Schedule A⁵, *supra*, page 117.

CARDINAL ARCHBISHOP

Vide Bishop.

CASH

IN RESIDENT estate should be listed in Schedule A², *supra*, page 102. Not taxable in NON-RESIDENT estate, *supra*, page 134.

CASH VALUE

It would seem that the legislature intended that "cash value" of § 231 should be synonymous with "clear market value" of subd. 7 of § 220 and "fair market value" of § 230.

"The language of the act has been justly condemned, for being involved and difficult to read clearly." *Matter of Swift*, 137 N. Y. 77-82.

"Sections 230 and 231 both contemplate the appraisal of the property at its fair market value at the time of the transfer, and that value must be proved by competent legal evidence to justify the appraiser in fixing any value." *Matter of Smith*, 71 App. Div. 602-604.

CAUSA MORTIS

"A gift *causa mortis* is made with respect to its effect after death, is conditional upon the happening of that event, and revocable during life, and may, therefore, be said to take effect at or after death." *Matter of Birdsall*, 22 Misc. 180-195, affirmed, without opinion, 43 App. Div. 624. It is subject to the tax. *Matter of Edwards*, 85 Hun, 436, affirmed without opinion, 146 N. Y. 380.

Subdivision 5, § 220, relates to gifts *causa mortis*. *Matter of Seaman*, 147 N. Y. 69-77, *supra*, page 198.

CEMETERY CORPORATION OR ASSOCIATION

Entitled to the exemptions under the second sentence of § 221, vide *supra*, page 41.

CEMETERY PLOT

Legacy for care of, exempt. *Matter of Maverick*, 198 N. Y. 618.

A reasonable amount spent in purchase of burial plot will be allowed as deduction. *Matter of Liss*, 39 Misc. 123.

CERTIFICATES OF DEPOSIT

Vide Bank Deposits.

CHARITABLE CORPORATIONS

By amendment of chap. 368, Laws 1905, in effect June 1, 1905, transfers to domestic charitable corporations were made exempt. *Matter of Higgins*, 55 Misc. 175.

Since amendment of § 221 by Laws 1911, chap. 732, in effect July 21, 1911, charitable corporations wherever incorporated are exempt.

IN *MATTER OF MCCARTIN*, N. Y. Law Journal, December 5, 1913, the decedent, a non-resident, died prior to 1911 amendment. Surrogate Cohalan held: "This is an appeal from an

order fixing tax. The executor contends that the value of the bequest given by the decedent to the Bishop of Newark 'in trust for a home for incurables to be established in Jersey City' is exempt from taxation. No proof was adduced before the appraiser of the law of New Jersey in regard to the validity and effect of bequests in trust for a charitable corporation to be formed after the death of the testator, and it will therefore be presumed for the purpose of this application that the law of New Jersey is the same as our law. If the bequest were made absolutely to the bishop it would not be subject to a tax (sec. 221, Tax Law; *Matter of Palmer*, 33 App. Div. 307), but the bequest is for a charitable corporation, and the bishop is merely the trustee designated by the decedent to pay the legacy to the corporation. Under the law in effect at the date of decedent's death, bequests to foreign charitable corporations were subject to the transfer tax (*Matter of Prime*, 136 N. Y. 347; *Matter of Balleis*, 144 N. Y. 132). It is immaterial whether the corporation was in existence at the date of decedent's death or whether it was formed subsequently (*Matter of Graves*, 171 N. Y. 40). The appeal is dismissed on this point."

UNDER LAWS OF 1900, CHAP. 382, not exempt. *Matter of Huntington*, 168 N. Y. 399; *Matter of Watson*, 171 id. 256; *Matter of Guggenheim*, 189 N. Y. 561, *supra*, page 347; *Matter of Crouse*, 34 Misc. 670.

Vide Exemptions, *post*, page 685.

CHILD

Entitled to five thousand dollars exemption and minimum rates of subd. 1 of § 221a; *supra*, pages 45 *et seq.*

Vide Adopted Child, *supra*, page 583, Illegitimate Descendants, *post*, page 719; Mutually Acknowledged Relation of Parent and Child, *post*, page 742.

CHOSE IN ACTION

- | | |
|---|--|
| (1) Interest of resident decedent
in another estate. | (3) Prior to 1911 amendment. |
| (2) Non-resident. | (4) Debt due from resident to
non-resident. |

A chose in action in favor of a resident decedent is subject to the tax whether against a resident or a non-resident. Subds. 1 and 4 of § 220 and § 243.

If the fair market value of the chose in action is not ascertainable at the time of the appraisal, its taxation should be

suspended. The report of the appraiser and the order of the surrogate entered upon the report under § 231 should note the fact that the taxation of the chose in action in question has been suspended for future appraisement. *Matter of Westurn*, 152 N. Y. 93-103; *Matter of Skinner*, 106 App. Div. 217-218.

(1) Interest of resident decedent in another estate

In *Matter of Sterry*, N. Y. Law Journal, April 30, 1912, the only property to which decedent was entitled at the time of his death consisted of a possible interest in his father's estate. Surrogate Cohalan held that "as the value of this interest, if any, could not be determined until the termination of the legal proceedings instituted for that purpose, the transfer tax on decedent's estate did not accrue until January 4, 1911, the date when the value of this interest was ascertained and paid."

Where, however, interest of decedent is ascertained and subject only to the life estate of a life tenant, decedent's interest is presently taxable. *Matter of Huber*, 86 App. Div. 458-463.

Vide cases cited sub Time of Tax.

(2) Non-resident

In estates of non-residents a chose in action has not been taxable since the amendment by chap. 732, Laws of 1911, in effect July 21, 1911. Subds. 2 and 4 of § 220 and § 243.

(3) Prior to 1911 amendment

As to taxation of a chose in action in non-resident estates prior to the 1911 amendment, vide *Matter of Houdayer*, 150 N. Y. 37; *Matter of Blackstone*, 171 N. Y. 682, sustained in 188 U. S. 189 sub nom. *Blackstone v. Miller*; *Matter of Daly*, 100 App. Div. 373, affirmed, without opinion, 182 N. Y. 524; *Matter of Zefita*, 167 N. Y. 280; *Matter of Clinch*, 180 N. Y. 300; *Matter of Lord*, 111 App. Div. 152, 157, affirmed, without opinion, 186 N. Y. 549, sustained in 211 U. S. 477 sub nom. *Beers v. Glynn*; *Matter of Fearing*, 200 N. Y. 340; *Matter of Tiffany*, 143 App. Div. 327, affirmed, on opinion of McLaughlin, J., below, 202 N. Y. 550, appeal pending in United States Supreme Court. Vide etiam *Matter of Ames*, 141 N. Y. Supp. 793; *Matter of Bentley*, 31 Misc. 656.

(4) Debt due from resident to non-resident

The question of the taxability of the transfer of a debt due from a resident decedent prior to the 1911 amendment was discussed by Surrogate Fowler in *Matter of Mary M. Page*,

N. Y. Law Journal, April 13, 1912, the surrogate saying: "The decedent, who was a resident of Lebanon, Pennsylvania, died on the 26th of April, 1910. She left a will which was probated in Pennsylvania. At the time of her death there was due to her from a resident of the State of New York the sum of \$4,600. This New York debtor duly qualified as an executor of her estate. The transfer tax appraiser included this indebtedness in the taxable assets of decedent's estate, and the executor has taken this appeal from the order entered upon the appraiser's report. It has been held that a debt due from a resident of this State to a non-resident has, for the purpose of the transfer tax, its situs in this State (*Blackstone v. Miller*, 188 U. S. 189), and that such an indebtedness constitutes a part of the estate of the non-resident creditor subject to taxation in this State (*Matter of Clinch*, 180 N. Y. 300; *Matter of Daly*, 100 App. Div. 373, *aff'd* 182 N. Y. 524).

"It is contended, however, that this matter comes within the decision of the Court of Appeals in the *Matter of Gordon* (186 N. Y. 471). In that case there was due to the estate of a non-resident decedent from the Equitable Life Assurance Society, a domestic corporation, the proceeds of a policy of life insurance, and it appeared from the appraiser's report that the insurance company had designated an individual in the State of decedent's domicile upon whom process could be served, and that it had at the date of decedent's death sufficient property in the foreign State to pay the claim of the decedent. The court held that under these circumstances the indebtedness of the Equitable Life Assurance Society to the estate of the decedent was not taxable here. The manner in which the Court of Appeals distinguished the *Matter of Gordon* from the cases above cited would seem to indicate that the authority of that case should be limited to cases involving precisely the same state of facts.

"As it does not appear that the New York debtor in the matter under consideration had any property in Pennsylvania which could be applied in settlement of his indebtedness to the decedent, I think this matter is distinguishable from the *Matter of Gordon*, and that it is controlled by the decisions in the *Matter of Clinch* and the *Matter of Daly* (*supra*). It appears, therefore, that the indebtedness due the decedent from a resident of this State was properly included in the taxable assets of decedent's estate."

CLAIMS AGAINST DECEDENT

Vide Schedule B³, *supra*, page 129; etiam cases cited sub Deductions, *post*, page 656.

CLAIMS DUE DECEDENT

Vide Debts Due Decedent.

CLEAR MARKET VALUE

Vide Cash Value.

CLOSELY HELD STOCK

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| (1) Contents of affidavit. | (11) Dividends not controlling, but may be taken into consideration. |
| (2) Stock having no "market value." | (12) In the absence of bona fide sales the book value may be taken as basis of valuation. |
| (3) Value can only be ascertained with reasonable certainty. | (13) Good will. |
| (4) Valuation of stock is a question of fact. | (14) Sale from one officer of corporation to another does not necessarily establish "market value." |
| (5) § 122 of Decedent Estate Law not applicable to stock not customarily bought and sold in the open market. | (15) Valuation of bonds. |
| (6) Unless there is evidence to show different value the sale price should govern. | (16) Pulitzer Estate. |
| (7) Appraisal in other proceedings not controlling. | (17) Stocks listed on local exchange. |
| (8) The basis of opinions must be given. | (18) Inactive securities that are customarily bought and sold in the open market. |
| (9) Large blocks of stock. | (19) § 122 of Decedent Estate Law as applied to comparatively inactive securities. |
| (10) Semon, Bach & Co. | |

(1) Contents of affidavit

In estates in which the assets include unlisted stocks there should be submitted to the appraiser an affidavit setting forth when and where the corporation was incorporated, its place of transacting business and the nature of its business, its authorized capital stock, the par value and the amount of stock issued and outstanding. If there are common and preferred stock, the amount of each issued and the preferences of the preferred stock should be given. The affidavit should also state what recent sales, if any, there have been of the stock. The affidavit or affidavits should be made by those who are in a position to give facts and not conclusions. If definite information cannot be given then the affiant should state what effort

has been made to obtain the data required, and should give the sources of information and the grounds of belief of any statements that the affiant may make upon information and belief. If there have been no sales, or if the sales have been too remote in point of time from the date of decedent's death, or if they have not been of sufficient volume, or if they have not been of such a character as to establish a market value within the definitions outlined in the cases cited below, then the estate should furnish such additional information as the appraiser may require to assist him in reaching a conclusion as to the fair valuation of the stock. How much information will be required depends upon the varying circumstances of each particular case. It is the practice to ask that there be given the value and nature of the assets of the corporation and a detailed statement of its liabilities. Also the amount of its earnings and dividends through a series of years. The earnings per annum and the dividends should be given for at least three years prior to the death of decedent. In some cases even after such affidavits have been filed it will be necessary to have hearings before the appraiser at which the question of the valuation will be tried out.

(2) Stock having no "market value"

The intrinsic difficulty of this subject is due to the fact that inactive stock not ordinarily dealt in has no "market value" in the ordinary meaning of that term. When the market value of stock is referred to among business men, it means the price at which it can be sold in the open market. Stocks listed on an exchange and actively dealt in have a market value from day to day. There are many corporations, however, whose stock is very rarely sold, and the price received for such stock may be governed by so many circumstances that it can hardly be said that the sale price is a market value in the common acceptance of the words. A high price might have been paid for such a stock in order to get control. On the other hand, a low price might have been accepted because the seller was compelled to sell and his market, so to speak, was limited to the persons in the corporation. Then again, there are corporations which are in reality family affairs and the question of the value of the stock is for the first time raised when a member of the family dies and his estate comes before the transfer tax appraiser.

(3) Value can only be ascertained with reasonable certainty

The question is often asked "What is the rule for the appraisal

of inactive or closely held stock?" From the very nature of such stocks there can be no fixed rule.

In the recent case of *Matter of Rees*, 208 N. Y. 590, the Court of Appeals had an opportunity to lay down a rule, but it rested content in affirming, without opinion, the order of the Appellate Division, which affirmed, without opinion, the order of the surrogate. The opinion of the surrogate was that "the value of stock in a corporation, the shares of which are not customarily bought and sold in the open market, is not capable of determination with mathematical certainty; it can only be ascertained with reasonable certainty."

Thus each particular corporation is a problem unto itself, to be struggled with by those upon whom has devolved the duty of seeing that the value of its stock should be properly appraised.

By reference to the digest of the *Rees* case, *supra*, page 392, it is apparent that the words "market value" of § 230 are not to be taken literally.

This situation is, after all, not an unnatural one. If instead of a valuation for inheritance taxation the valuation was being made for a bargain and sale of the stock during the lifetime of the owner, would there not be difficulties in arriving at the value? I think so. If one were to buy stock in a closely held corporation there would be a number of things which one would want to know before the purchase was consummated. What these elements might be would necessarily differ with stock in different corporations. As it is in the every day dealings of men so in the appraisal for taxation purposes it is necessary to treat each case according to the peculiar facts of the transaction.

(4) Valuation of stock is a question of fact

The Court of Appeals has said that the question of the valuation of stock is a question of fact. *Matter of Thayer*, 193 N. Y. 430-433. Like every other question of fact it must be litigated if disputed. As a guide for such disputes there are quoted the following judicial expressions.

(5) § 122 of Decedent Estate Law not applicable to stock not customarily bought and sold in the open market

Section 122 of Decedent Estate Law is not controlling in valuing an inactive stock. *Matter of Curtice*, 111 App. Div. 230-233, affirmed, without opinion, 185 N. Y. 543. For digest of case *vide post*, page 324.

In *Matter of Alfred S. Malcolmson*, N. Y. Law Journal, June 20, 1912, the surrogate held: "This appeal from the order fixing tax is taken by the State Comptroller upon the ground that the appraiser adopted an incorrect method of appraisal in ascertaining the value of decedent's holdings of stock in the Franklin H. Kalbfleisch Company. The decedent died on the 4th of June, 1909. At that time he owned 669 shares of stock in the Franklin H. Kalbfleisch Company. This stock was not customarily bought and sold in the open market. On the 20th of July, 1910, 75 shares were sold at auction by the executors, and the price received was \$5 a share. On the 9th of May, 1911, the executors sold to a subsidiary of the Franklin H. Kalbfleisch Company 372 shares of the stock at \$15 a share. The appraiser found that the average of these two sales represented the fair market value of the stock at the date of decedent's death. Section 122 of chapter 18 of the Laws of 1909, prescribing the method by which the value of stocks may be ascertained, applies only to stocks that are customarily bought and sold in the open market (*Matter of Kennedy*, N. Y. Law Journal, March 8, 1911; *Matter of Chambers*, N. Y. Law Journal, January 31, 1912). There is no authority for the proposition that the value of a stock which is not bought or sold in the open market may be ascertained by taking the average price of two sales, one of which was made one year after decedent's death and the other two years after that event. The value of the stock is to be ascertained as of the date of decedent's death, and this necessarily excludes any consideration of what it may have been sold for two years after his death. As the securities of this company were not customarily bought and sold in the open market the appraiser should have ascertained the value of the stock from the statement of assets and liabilities taken from the books of the company (*Matter of Bach*, N. Y. Law Journal, November 21, 1911). These books are proper evidence of the value which the corporation places on its assets, but it may be shown that this value is excessive, insufficient or otherwise incorrect. The appraiser therefore should take into consideration the evidence submitted as to the excessive value at which certain assets were alleged to be carried upon the books of the company, and from this evidence and the report of the expert accountant determine the value of the stock as of the date of decedent's death. The order fixing tax will be reversed and the appraiser's report remitted to him for correction as indicated."

(6) Unless there is evidence tending to show different value the sale price should govern.

"In the absence of evidence of any fact tending to show that the sales of the stock that were actually made from the date of the incorporation of the defendant down to a period several months after the death of the decedent were not at the fair market value at the time they were made, and in the absence of evidence tending to show that a stock earning 6 or 8 per cent. dividends a year was worth more than the price at which the stock had been sold, or if any special fact or circumstance showing any greater value of the stock than that at which it had been sold, the appraiser was not justified in fixing the value of the stock at a greater price than was fixed by original appraisal." Matter of Elizabeth H. Smith, 71 App. Div. 602.

In Matter of Achelis, N. Y. Law Journal, March 9, 1912, in remitting report to appraiser Surrogate Fowler said: "As it is alleged that the stock is not bought and sold upon the open market, and THERE WAS NO EVIDENCE OF ANY SALE WITHIN A REASONABLE TIME before or after decedent's death, the appraiser should have obtained a statement of the assets and liabilities of the company, so as to enable him to ascertain the intrinsic value of the stock."

(7) Appraisal in other proceedings not controlling

American News Company: The only evidence before the appraiser was an affidavit showing that the value of the stock was \$59.73 per share, and he placed a valuation of \$100 upon it. The surrogate said: "The contention of the State Comptroller in the statement submitted by him upon this appeal that, as the stock had been appraised in other transfer tax proceedings at \$100 per share, the appraiser was justified in appraising it in this proceeding at \$100, is untenable, as the value of the stock is not absolute and fixed like a mathematical quantity, but varies continually with the varying conditions of business, the ease or stringency of the money market and the public demand for the stock. As this stock is not sold upon the market the appraiser should have adopted some means of ascertaining its real value if he was not satisfied with the valuation placed upon it in the affidavit submitted by the executors." Matter of Willmer, 75 Misc. 62-66, affirmed, 153 App. Div. 804.

(8) The basis of opinions must be given

Opinion of the president and treasurer of the company as to

the value of the stock was adopted by the appraiser. The surrogate in directing a new appraisal said, "The basis of these opinions is not given, and there is virtually no foundation for the finding of the appraiser." Matter of Bolton, 35 Misc. 688-689.

Comptroller on appeal to surrogate sought rehearing for purpose of revaluation of certain stock not having "any quoted or market value." The papers filed by Comptroller contained "conversations with brokers and others in regard to the valuations of these stocks." Rehearing denied, the surrogate saying, "there is nowhere contained in the appellant's papers a specific fact, or statement of any person competent to judge that this stock is worth one dollar more than the sum for which it has been appraised." Matter of Johnson, 37 Misc. 542.

(9) Large blocks of stock

National Casket Company stock appraised at 90. The book value was about 140, of which a portion was "water;" deducting the "water" the book value was about par. Witness for estate testified that stock could perhaps be sold at 60, while another witness testified that highest price stock had sold at was 70. The intestate owned 3,219 shares. The court say: "The fact that there was not a ready market for a large amount of the stock has a direct bearing. There is an entire absence of anything in the record to justify the appraisal of this stock at \$90 per share. The amount of the stock, the market for it and whether a large block could be sold are elements to be considered in fixing its value." Matter of Chappell, 151 App. Div. 774-775. As to contrary doctrine vide Matter of Jay Gould, 19 App. Div. 352-360, affirmed on this point in 156 N. Y. 423; Matter of John S. Kennedy, *supra*, page 115. Vide etiam Matter of Curtice, 185 N. Y. 543, *supra*, page 325. .

(10) Semon, Bach & Co.

In Bach Estate, New York Law Journal, November 21, 1911, Surrogate Fowler handed down the following opinion: "Decedent died in November, 1909, a resident of the County of New York. At the time of his death he owned 1,278 shares of the preferred and 1,060 shares of the common stock of Semon, Bach & Co. These holdings represented a majority interest in the corporation. In the affidavit of assets submitted to the appraiser by the executor of the estate the value of the common stock was given at \$35 per share. The expert accountant employed by the State Comptroller, after a thorough examination

of the books of the company, submitted a statement showing that the intrinsic value of the common stock at the date of decedent's death was \$73.59 a share. In the report filed by the transfer tax appraiser in this court he has appraised this stock at \$20 a share. The stock was not listed upon any exchange and it was not commonly sold upon the market. It paid a dividend of 15 per cent. in 1907 and 20 per cent. in 1909.

(11) Dividends not controlling, but may be taken into consideration

"No dividends were paid in 1908. While amount of dividends paid on a stock is not controlling evidence of its value (Matter of Smith, 71 App. Div. 602; Matter of Curtice, 111 App. Div. 230, aff'd 185 N. Y. 543), it may be taken into consideration in estimating the value of a stock which is not commonly bought and sold in the open market. The intrinsic value of the stock as ascertained by the expert accountant appears to be a conservative estimate, but as the statute requires the appraiser to appraise the stock at its clear market value it may fairly be assumed, in view of the fact that the decedent took an active interest in the management of the company and had an established reputation in connection with the business conducted by the company, that the market value of this block of stock after his death would be slightly less than the book value. I feel, therefore, that in estimating the market value of this inactive stock some deduction from the book, or intrinsic, value should be made, and it appears to me that twenty points would be a fair deduction. I therefore find that the fair market value of the 1,060 shares of common stock of Semon, Bach & Co. held by the decedent at the time of his death was \$53.59 a share. The appraiser's report will be remitted to him for correction accordingly."

Porous Plaster Company: Stock valued at 400 per cent, the appraiser placing a half of the value upon certain secret remedies and the good will; the stock had earned and paid for seventeen years from 48 to 60 per cent upon its par value. "while the earning power of a corporation is not proof of the value of its property, nevertheless it is competent evidence of value, and is a feature to be considered in determining the valuation to be placed upon the stock for the purposes of taxation." Matter of Brandreth, 28 Misc. 468-473, *supra*, page 255, affirmed, 169 N. Y. 437.

In *Matter of Harriott*, N. Y. Law Journal, March 1, 1913, Surrogate Fowler dismissed appeal taken by executor, saying: "The ground of appeal is that the valuation placed by the appraiser on the common stock of the Pioneer Contracting Company was excessive. This value is based upon the report of Marvin L. Scudder, annexed to appraiser's report, and in which it appears that \$4,000 worth of common stock was earning 25% per annum. On this basis the value of each share of common stock was fixed at \$250. The findings of the appraiser as to the value of the common stock was correct and on this account the appeal is dismissed."

(12) In the absence of bona fide sales the book value may be taken as basis of valuation

In *Matter of Henry C. Valentine*, N. Y. Law Journal, March 13, 1913, Surrogate Fowler held: "The State Comptroller appeals from the order fixing tax, and alleges that the value placed by the appraiser upon the decedent's holdings of stock in the Valentine Company was less than its market value, while the executor appeals upon the ground that the appraiser's valuation was excessive. The decedent died on the 15th day of January, 1912. At that time he was the owner of 2,636 shares of the stock of the Valentine Company. The entire capital stock of the company consists of 125,000 shares of the par value of \$100 a share. The appraiser valued the stock at \$125.72 a share. The State Comptroller contends that he should have valued it at \$160.72 a share, while the executor contends that the valuation should not exceed \$100 a share.

"The stock is not customarily bought and sold in the open market. The evidence shows that none of the stock had been sold during the two years prior to decedent's death. There was evidence that in the early part of January, 1910, the holdings of one of the large stockholders, amounting to 2,500 shares, were transferred to some of the other large stockholders at \$90 a share. The length of time which elapsed between the making of this sale and the death of the decedent, as well as the peculiar circumstances under which the sale took place, renders the price paid at that time no satisfactory criterion of the value of the stock at the date of decedent's death (*Matter of Malcolmson*, Surr. Decs., 1912, p. 691). As there was no competent evidence of sales of the stock the appraiser was correct in ascertaining the book value of the stock from the assets and liabilities of the

company. The annual statement of the company made on the 30th day of November, 1911, showed that the book value of the stock at that date was \$129.04 a share, exclusive of the value of the good will. While the book value of the stock represents its intrinsic worth it may not represent its market value, and the latter is that which it is the duty of the appraiser to ascertain. But if there have been no sales of the stock in the open market he must necessarily fall back upon the book value as the nearest approximation to the market value.

"In ascertaining the value of securities that are not customarily bought and sold in the open market it would seem that in the absence of bona fide sales the book value of the assets of the corporation should be taken as the basis of computation. The books of the corporation show the valuation which the corporation places on its assets, and in the absence of evidence that it is excessive or incorrect it should be taken as the actual value of such assets; but a reasonable percentage should be deducted from the value placed upon merchandise, bills receivable and plants in order to ascertain their market value. In the absence of competent evidence upon this point such deduction should not exceed ten per cent. This rule has the advantage of mathematical certainty; and when to the book value as thus ascertained is added the value of the good will of the business, the result very closely approximates the market value of the stock. The opinions of stockholders and such witnesses are usually speculative, and vary so materially as to render it difficult for the appraiser to ascertain the market value based upon such evidence. Deducting ten per cent from the book value of the plant, merchandise and bills receivable, and taking into consideration the change effected in the cash account as shown by the testimony of Phillips, it appears that the book value of the stock at the date of decedent's death was \$112.18 a share, exclusive of the value of the good will. The average annual net profits for the three years immediately preceding decedent's death was \$198,064.38, and the appraiser ascertained the value of the good will by multiplying this average by two.

(13) Good will

"In view of the fact that the business has been conducted under the same name since 1832 this would seem a very reasonable value for the good will of the business. In *Von Au v. Magenheimer* (126 App. Div. 257) the value of the good will was found

to be five times the average net annual profits. In the Matter of Keahon (60 Misc. 508) the value of the good will was fixed at three times the net annual profits. As the appraiser ascertained the value of the good will to be twice the average net annual profits, he should have taken the average profits for the two years immediately preceding the decedent's death instead of the three years. This would make the value of the good will \$383,308, or about \$30.66 a share. According to this method of calculation the value of each share of stock at the time of decedent's death was \$142.84. The annual statement for 1911 shows that after providing for a dividend of ten per cent. there was a surplus of about \$16 a share. The appraiser, after ascertaining the book value of the stock, arbitrarily deducted therefrom 35 points and found that the remainder was its market value. There appears to be no justification for such a deduction. There was no evidence that the decedent's personality or business ability was in any way responsible for the success which the company had achieved. The amount which the company intended to expend for advertising purposes during the year 1912 should not be taken into consideration, as it is reasonable to assume that such advertising would not be an absolute loss, but would result in a corresponding increase in the business of the company. The other possible sources of increased expenses are too remote to be taken into consideration in ascertaining the value of the stock at the date of decedent's death. From the appraiser's report and all the evidence adduced before him I find that the value of the decedent's holdings of stock in the Valentine Company at the date of his death was \$142.84 a share. The order fixing tax will be reversed and the appraiser's report remitted to him for correction."

The shares of "New York Times," a joint stock association, held to be properly valued by appraiser who included GOOD WILL in the "Times." Vide Matter of Jones, 69 App. Div. 237-244, reversed on other points in 172 N. Y. 575, the Court of Appeals saying at page 586: "These shares were not listed upon the Stock Exchange, or sold in the open market, and the only way to get at their value was to ascertain the property they represented." Vide cases cited sub Good Will.

(14) Sale from one officer of corporation to another does not necessarily establish "market value"

Upon the filing of the appraiser's second report in MATTER

OF HENRY C. VALENTINE, Surrogate Fowler held (N. Y. Law Journal, December 4, 1913): "This matter was sent back to the appraiser for the purpose of taking further testimony concerning the value of the testator's stock in Valentine & Co. (incorporated). Such testimony has been taken, but it throws very little light on the issue; it is not satisfactory. *Prima facie* the book value is evidence against the holder of stock. The presumption may be rebutted by proof of 'market value.' A sale of stock from one officer of a business corporation to another officer or stockholder does not establish 'market values.' There may be no 'market value' for the stock of private business corporations. In that event the falsity of the book value must be shown in other ways, such as an actual appraisal of the property of the corporation. Here no evidence is submitted in the nature of an appraisal of the items of property belonging to the corporation. Our former decision in this matter must therefore be affirmed."

(15) Valuation of bonds

LUDWIG BAUMANN & Co., a corporation engaged in the business of selling furniture on the installment plan, upon its organization as a corporation issued bonds for the amount by which the assets of the business (then being conducted as a partnership) exceeded its liabilities. The valuation of these bonds was involved in the MATTER OF FROELICH, N. Y. Law Journal, April 30, 1913, the decedent owning 295 of the bonds. Surrogate Fowler remitted the report of the appraiser for the purpose of obtaining additional evidence, saying in his opinion: "These bonds bear interest at 3% when earned, but the resolution authorizing the issue of the bonds was not introduced in evidence, nor were the books of the company nor any duly authenticated extracts therefrom submitted to the appraiser. This allegation as to the rate of interest is supported solely by the testimony of a witness who appeared on behalf of the estate, and in view of the low rate of interest as well as the unusual condition upon which its payment depends the testimony of the witness would seem to require that corroboration which would be furnished by the introduction in evidence of the resolution authorizing the issue of the bonds.

"AS THE BONDS WERE NOT CUSTOMARILY BOUGHT AND SOLD IN THE OPEN MARKET their value for the purpose of the imposition of a transfer tax should be ascertained with reference to the value

of the assets upon which they are a lien, as well as the rate of interest which they bear. A memorandum was submitted to the appraiser purporting to be a statement of the assets and liabilities of the company at the time of decedent's death. This statement on its face indicates that the value of the assets is in excess of the bonded indebtedness; but an officer of the company testified before the appraiser that the value of the assets as given in the statement referred to was considerably in excess of their actual value. He testified that the merchandise on hand instead of being worth \$235,569, as given on the statement, was worth only \$170,569; that the value of the bills receivable instead of being \$816,871 was only \$283,435. He also testified that the book value of the merchandise represented its cost to the company.

"The allegation that it was worth \$60,000 less than its cost should be supported by the testimony of an expert or corroborated by the books of the company showing the amount realized from the sale of this merchandise. The value of the accounts receivable as given by the witness was not verified by any reference to the books of the company or by any statement of the amount actually collected. As the books of the company were the best evidence of the value which the company placed upon its assets as well as the amount actually realized from the bills receivable account, they should have been introduced in evidence for the purpose of proving these facts. While one of the witnesses testified that the value of the accounts receivable was about one-third of their book value, another witness testified that only 12% of the accounts became a total loss and 8% became uncollectible after a certain amount of collections had been made thereon. NO ATTEMPT WAS MADE TO RECONCILE THESE CONFLICTING STATEMENTS. As the appraisal was made about two years after the death of the decedent, the books of the company would show what amounts were realized from the accounts receivable and what amount was realized from the merchandise on hand at the time of decedent's death. If, however, it would be inconvenient to have the books introduced in evidence before the appraiser they should be examined by an expert accountant in order to ascertain with reasonable accuracy the value of the assets of the company. No witnesses were examined, nor was there any evidence adduced on behalf of the State Comptroller.

"THE INDEFINITE AND INCOMPETENT TESTIMONY taken before

the appraiser, and constituting that part of his report upon which the surrogate must depend for the facts necessary to a determination of the correctness of the appraiser's conclusions, is entirely insufficient to enable the surrogate to determine the question raised by this appeal. The report of the appraiser, therefore, will be remitted to him for the purpose of obtaining additional evidence as to the value of the assets of Ludwig Baumann & Co. at the time of decedent's death."

(16) Pulitzer Estate

In Matter of Joseph Pulitzer, N. Y. Law Journal, December 10, 1912, Surrogate Cohalan in remitting the report of the appraiser said: "Among the items of personal property are the following: Four thousand nine hundred and ninety shares of the Press Publishing Company, par \$100 per share, appraised at \$604.50 per share, \$3,016,455; 9164 shares of the Pulitzer Publishing Company, par \$100 per share, appraised at \$121.75, \$1,115.717.

PRESS PUBLISHING COMPANY.

"Among the affidavits submitted to the transfer tax appraiser in regard to the value of this stock appears one of Mr. N. H. Hotsford, auditor of the Press Publishing Company, publisher of the New York World, dated January 29, 1912, in which he states that the net profits of the Press Publishing Company for the year 1908 were \$333,673; for the year 1909 were \$662,391; for the year 1910 were \$702,374; for the year 1911 were \$552,883; total \$2,251,321. From this net total the appraiser deducted \$105,000 alleged to have been paid as bonuses to employees of the newspaper. The nature of these bonuses, whether gifts or contractual obligations, is not shown. Assuming these bonuses to have been voluntary contributions to the employees of the newspaper, in my opinion they have been erroneously deducted, and the net profits for the four years should be placed at \$2,251,321 instead of \$2,146,321. This would make the average net profits for the four years preceding decedent's death \$562,830.25 instead of \$536,580, as shown in the report of the transfer tax appraiser.

PULITZER PUBLISHING COMPANY.

"The affidavit of James T. Keller, auditor and treasurer of the Pulitzer Publishing Company of St. Louis, Mo., the publisher of the St. Louis Despatch, dated January 19, 1912, shows that the net profits of that corporation for the year 1908 were

\$350,380.89; for the year 1909 were \$441,823; for the year 1910 were \$470,761.46; for the year 1911 were \$370,862.12, making a total of \$1,633,827.87, an average of net profits for each of said four years of \$408,456.97.

ASSOCIATED PRESS.

"Among the assets of the Press Publishing Company are two shares of stock in the Associated Press, and among the assets of the Pulitzer Publishing Company of St. Louis, Mo., was one share of stock in the Associated Press. These shares of stock were appraised in each case at their face value of \$1,000 per share, and the only testimony regarding their value is that of Mr. Melville E. Stone, who testifies that this is the par value of said stock.

SURROGATE HOLDS THAT SECURITIES UNDERVALUED.

"In view of the fact that the net earnings of the Press Publishing Company, without deducting the bonuses of \$105,000 from the earnings for 1911, averaged \$562,830, and deducting such alleged bonuses would average \$536,580 for each of the four years preceding decedent's death, indicating a return of almost 19 per cent. on \$3,016,455, the appraised value of this stock, and the further fact that the average yearly net earnings for the four years preceding the decedent's death on the stock of the Pulitzer Publishing Company of St. Louis, Mo., were \$408,456.97, indicating a return of almost 37 per cent. on \$1,115,717, the appraised value of said stock, and in view of the fact that the par value of said stock was taken as the appraised value of said Press Publishing Company's and Pulitzer Publishing Company's holdings of the stock of the Associated Press, the stock without which any newspaper published in New York City and claiming to be first class in its rank could not well exist, it is quite apparent that these several securities have been grossly undervalued, possibly to the extent of many millions of dollars, for on a 5 per cent. basis of earning power the holdings of decedent's estate in the stock of the Press Publishing Company should be appraised at upwards of \$11,000,000 instead of \$3,016,455, while the holdings of decedent's estate in the Pulitzer Publishing Company on the same basis of earning power should be appraised at upwards of \$8,000,000 instead of \$1,115,717. If these properties were figured on a 10 per cent. basis of earning power the value of the estate's holdings in the Press Publishing Company would be upwards of \$5,500,000, and the value of the holdings in the Pulitzer Publishing Com-

pany of St. Louis would be upwards of \$4,000,000. Bearing all this in mind, coupled with the circumstances that no witnesses were called on behalf of the State to contradict any of the testimony offered on behalf of the estate of the decedent, it seems to me that the report should be remitted to the appraiser for further and fuller testimony along the lines now criticised.

PERSONALITY OF JOSEPH PULITZER.

"It is contended on behalf of the estate that the personality of Joseph Pulitzer was in a great measure responsible for the earning capacity of these two newspapers, and that his death greatly reduced such earning capacity. If this contention is made in good faith it would be very easy for the estate to show the earnings of these two newspapers for the year since decedent's death, but no testimony of this kind was offered."

(17) Stocks listed on local exchange

Rochester Stock Exchange market quotations were offered as valuations of stock. In the case of stock not listed the witness on behalf of the estate gave his opinion as to values; it does not appear from report as to qualification of witness except that witness "gave his own opinion or sought information from interested parties who were conversant with the affairs of such corporation, and from such information fixed the value as to such stock. He also testified that, if these stocks were offered for immediate sale, the price would drop from ten to fifty points, but he further testified 'It would take at least a month or six weeks to close out these stocks at the prices I have quoted in the inventory.'" The appraiser fixed the valuations upon the market price of the Rochester Exchange, and in the instances where the stock was not listed, the appraiser fixed the valuation substantially on the valuation given by the witness called for the executors. The executors appealed on the ground that the valuations should be reduced by ten per cent "for the reason that the stocks included in said appeal are local stocks and not listed on any stock market other than the Rochester Stock Exchange." Surrogate Kiley sustained the appraiser, and held that the Curtice case, 111 App. Div. 230 (affirmed, without opinion, 185 N. Y. 543), did not apply, as the stocks in question "although local stocks are not stocks that could be classed as stocks of private corporations or as corporations largely owned by one family." The surrogate further saying, "there is no evidence that Mr. Cook's interest therein was so large as to

affect the market values of the stock." *Matter of Cook*, 50 Misc. 487-493-4, decree affirmed in 187 N. Y. 253-262, except as to rate of taxation for transfer to a child of an adopted child.

(18) Inactive securities that are customarily bought and sold in the open market

Surrogate Fowler in *Matter of Josephine B. Chambers*, N. Y. Law Journal, January 31, 1912, held that for the purpose of assessing a transfer tax, the value of inactive securities that are customarily bought and sold in the open market is the average price at which sales of such securities have been made for three months before and three months after decedent's death. In his opinion the surrogate said: "This appeal from the order fixing tax is taken by the executor and trustee of decedent's estate upon the ground that the appraiser erred in estimating the value of 1,208 shares of stock of the Singer Manufacturing Company held by the decedent. The appraiser valued this stock at \$481. The executor contends that the stock at the date of decedent's death was worth only \$400.

The decedent died on the 10th day of November, 1909. The only evidence adduced by the executor to show the value of this stock is an affidavit of John S. Stanton, in which he alleges that two shares of the stock were sold on November 8, 1909, at \$472 a share, and two shares on the 3d of August at \$455 a share. This affiant also alleges that it would have been impossible at the date of decedent's death to have realized the above prices for so large a block of stock as 1,208 shares, and that in his opinion the market value of the shares at the date of decedent's death was \$400 per share. The attorney for the State Comptroller submitted an affidavit by one Marvyn Scudder, who alleged that from investigations made by him he considered that the fair market value of the stock at the date of decedent's death was \$484 per share. Attached to the appraiser's report and submitted on behalf of the State Comptroller are certain statements made by Scudder. These statements, however, are not verified and should not have been received by the appraiser. They are therefore not entitled to any consideration in a proceeding to determine the value of this stock.

"No statement of assets and liabilities of the Singer Manufacturing Company was submitted to the appraiser, but it appears that the dividend paid in 1909 was 30 per cent. and in 1908 15 per cent. Upon this appeal an affidavit was submitted by

George F. Martin, the examiner of values in the New York City office of the State Comptroller. He alleges that ten shares of stock of the Singer Manufacturing Company were sold on September 28, 1909, at \$471 per share; that four shares were sold on October 21, 1909, at \$475 a share; that five shares were sold on November 16, 1909, at \$484 per share, and that seven shares were sold on December 13, 1909, at \$494 per share. The average selling price, based upon these sales, would be \$481, the price adopted by the appraiser. This, however, does not include the two shares of stock reported by Mr. Stanton to have been sold on November 8 at \$472.

(19) § 122 of Decedent Estate Law as applied to comparatively inactive securities

"Section 122 of the Decedent Estate Law provides that 'whenever by reason of the provisions of any law of this State it shall become necessary to appraise in whole or in part the estate of any deceased person, the persons whose duty it shall be to make such appraisal shall value * * * all such property, stocks, bonds or securities as are customarily bought or sold in open markets in the City of New York or elsewhere, for the day on which such appraisal or report may be required, by ascertaining the range of the market and the average of prices as thus found, running through a reasonable period of time. The affidavits submitted by both parties show that while the stock of the Singer Manufacturing Company is not listed upon the New York Stock Exchange it is nevertheless customarily bought and sold in the open market. Therefore it comes within the classification of securities the manner of whose appraisal is prescribed by the section of the Decedent Estate Law above quoted.

"It was held by this court in the Matter of Kennedy (N. Y. Law Jour., March 8, 1911) that the price of active securities should be ascertained by taking the average price for two months before and two months after decedent's death, while the price of comparatively inactive securities should be ascertained by computing the average price at which the securities sold within a reasonable time before and after decedent's death. What constitutes a reasonable time would appear to depend upon the demand for the stock as evidenced by the number of sales made. If a range of two months before and two months after decedent's death would be a reasonable time in which to ascertain the value of active securities, as held in the Matter of Kennedy (*supra*),

it would appear that a range of three months before and three months after decedent's death would be a reasonable time in which to compute the value of inactive securities that are customarily bought and sold on the market.

"The question of the value of the Singer Manufacturing Company stock was before the Surrogate's Court of Sullivan County in 1903 upon an appeal from an order fixing tax. In that matter there was evidence before the appraiser that, according to reports in the *Financial Chronicle*, the stock was worth from \$240 to \$250 at the date of decedent's death in 1902. Mr. Stanton, whose affidavit on behalf of the executor forms part of the appraiser's report in the matter under consideration, testified that during the year 1902 the price ranged from \$238 to \$300. Another witness testified that in his opinion the value of the stock was \$245. The surrogate held that the appraiser was correct in appraising the stock at \$245 a share, and no appeal was taken from his order (Matter of Proctor, 41 Misc. 79).

"In the Matter of Curtice (111 App. Div. 230, aff'd 185 N. Y. 543) there was before the court the question as to the value of the stock of a corporation known as Curtice Brothers Company. It was a private family corporation engaged in the manufacture of jellies, &c. It was not dealt in upon any market or exchange, except that a few sales had been reported as having been made at Rochester during the year previous to decedent's death. Immediately after decedent's death there was a bid quotation of \$110 for the common and a reported sale of ten shares of the preferred at 107½. The appraiser valued decedent's holdings of the preferred and common stock at these figures. Two witnesses testified that in their opinion the value of the preferred was \$90 and the common \$80 per share. There was no statement of the assets and liabilities of the company. The Appellate Division modified the order of the surrogate by reducing the value of the common to \$100 per share and the preferred to \$97.50 per share. It is apparent from this decision that no definite rule by which the price of such securities could be ascertained was enunciated by the Appellate Division in that case. It is, however, distinguishable from the matter under consideration in the fact that it was a small corporation, capitalized at \$1,500,000 and controlled by one family, while the Singer Manufacturing Company was at the time of decedent's death capitalized at \$30,000,000; and in the further fact that the stock of the Singer Manufacturing Company is customarily bought and sold

in the open market. The allegation in the affidavit of John S. Stanton that the attempt to dispose of 1,208 shares of the Singer Manufacturing Company stock at the date of decedent's death would cause a material reduction in the price, should not be considered by the appraiser in estimating the fair market value of this stock at the date of decedent's death (*Matter of Gould*, 19 App. Div. 352; *Matter of Proctor*, 41 Misc. 79; *Matter of Kennedy*, N. Y. Law Jour., March 8, 1911).

"Adopting the rule that the average price of this comparatively inactive security for three months before and three months after decedent's death would represent its fair market value upon the date of decedent's death, it would appear that the total number of sales made during that time, according to the affidavits of George F. Martin and John S. Stanton, were twenty-eight shares at an aggregate value of \$13,432. This would represent an average price of \$480 per share. The appraiser having appraised the 1,208 shares of Singer Manufacturing Company stock held by the decedent at \$481 per share, his report should be corrected by appraising these shares at \$480.

"As the value of the temporary life estate of decedent's son in the entire estate must be ascertained by the State Superintendent of Insurance, the order fixing tax cannot be modified by the Surrogate upon this appeal, but the appraiser's report should be remitted to him for correction as indicated, and for the further purpose of ascertaining the value of the temporary life estate of decedent's son in the entire estate as shown by the appraiser's corrected report."

Singer Manufacturing Company stock was also appraised in *Matter of Proctor*, 41 Misc. 79. The executors contended that the stock had no market value at the time of decedent's death, April 8, 1902, and that the book value alone should control its appraisal. Surrogate Smith of Sullivan County upheld the appraiser's valuation at 245, saying: "The evidence shows that where there is a market for this at all times and that it is quoted in the financial publications and authorities, although it is not listed on the New York Stock Exchange and is not bought and sold in the Curb market. While the stock was very inactive and the sales infrequent, and mostly of a private nature, still they were sufficient to establish a market value for the purpose of taxation. The sales were made in the regular and usual course of business, and some of them at public auction. It is not necessary that sales of this class of property should be made

upon the exchanges. The question to determine is: What is the fair market value of this property? And any evidence which will tend to throw light upon that inquiry is competent. The opinions of witnesses qualified to answer; the price quotations contained in market reports and authentic publications; the prices established by actual sales of the property, and in the absence of other competent evidence the actual or intrinsic value of the property itself. The executors complain that the sales were so infrequent and insignificant, and the opinions of the witnesses were based upon such unreliable information as to be incompetent upon this question. The evidence is not as satisfactory as we might wish, but it is all that has been given; and all it seems, that could be obtained. Nor can it be said that the trades shown by the evidence were so trifling and insignificant as to be of no assistance in determining the value of the stock. The sale on April 14, six days subsequent to the decedent's death, of 105 shares at $245\frac{1}{2}$, amounted to upwards of \$25,000, and the several sales of 10 and 20 share lots would run up to several thousand dollars. I think, under the testimony, that this stock is one that was customarily bought and sold in the open market, and that its market value was at least 245 at the decedent's death. The appraiser was not confined to sales of the stock made previous to decedent's death. Upon the question of market value evidence of sales for a reasonable time after, as well as before, the day on which it was to be determined, is admissible. Nor is the question affected by reason of the fact that large blocks of the stock being offered at one time would break the market. *Dana v. Fiedler*, 12 N. Y. 40. The book value of the stock as shown by the executors, viz.: The value of the capital stock at par and the undistributed surplus would not form a proper basis of value of this property. Assuming that the contention of the executors is correct, that the stock has no market value, it is nevertheless taxable. *Matter of Brandreth*, 28 Misc. Rep. 468. And in such case the appraiser must ascertain the actual value of the property, taking into consideration the earning power of the property and the good-will of the business. * * * Had the executors given evidence showing, not only the book value of the stock based upon the amount of the capital and surplus, but the actual earning capacity of the plant and the good will of the business, we might have been constrained to abandon the speculative field of market value, but having shown no facts from which the actual value of the stock

can be determined, I think the appraiser was justified in his determination that it had a market value, and that in the light of all the evidence his valuation is very favorable to the estate."

CODE OF CIVIL PROCEDURE

§ 190. Appeal to Court of Appeals dismissed unless order appealed from final. *Matter of Browne*, 195 N. Y. 522; *Matter of Vivanti*, 200 N. Y. 513.

§ 191. Appeal to Court of Appeals limited to a review of questions of law. *Matter of Thorne*, 162 N. Y. 238; *Matter of Mahlstedt*, 171 N. Y. 652.

§ 382. Re statute of limitations. *Matter of Strang*, 117 App. Div. 796-797; *Matter of Moench*, 39 Misc. 480-482; § 245 of Tax Law.

§ 447. Re action affecting real estate upon which there is "a lien under the transfer tax act."

§ 784. Time to appeal cannot be extended by court or judge. *Matter of Seymour*, 144 App. Div. 151-152.

§ 829. *Matter of Gould*, 19 App. Div. 352-355, modified in 156 N. Y. 423, but not as to ruling re § 829; *Matter of Brundage*, 31 App. Div. 348; *Matter of Nathaniel W. White*, 116 App. Div. 183-185; *Matter of Bentley*, 31 Misc. 656; *Matter of Porter*, 60 id. 504; *Hoag v. Wright*, 174 N. Y. 36-39; *Matter of Hennessey*, 157 App. Div. 136; *Matter of Hartman*, N. Y. Law Journal, October 8, 1913, opinion quoted *supra*, page 858.

Contra, *Matter of Thompson*, 81 Misc. 86.

§ 837. *Matter of Lord*, 186 N. Y. 549, *supra*, page 335; *Matter of David Kennedy*, 113 App. Div. 4-9.

§ 887. Re depositions taken without the state for use within the state. *Matter of Wallace*, 71 App. Div. 284.

§ 942. Laws of another state or country should be proved. *Tilt v. Kelsey*, 207 U. S. 43-57; *Matter of Vivanti*, 206 N. Y. 656; *Matter of Cummings*, 142 App. Div. 377-386.

§ 1279. Submission of controversy on an agreed statement of facts. *Isham v. N. Y. Assn. for Poor*, 177 N. Y. 218; *Catlin v. Trustees of Trinity College*, 113 N. Y. 133; *Brown v. Lawrence Park Realty Co.*, 133 App. Div. 753.

§ 1290. Held not to apply to transfer tax proceeding. *Matter of Sherar*, 25 Misc. 138; *Matter of Mather*, 41 id. 414-417, affirmed 90 App. Div. 382 and 179 N. Y. 526; *Matter of Wallace*, 28 Misc. 603-606. Vide Vacating Decree, *post*, page 878.

§ 1338. Matter of Brandreth, 169 N. Y. 437-440; Matter of Davis, 184 N. Y. 299.

§ 2067 et seq. Re mandamus. Matter of Kelsey v. Church, 112 App. Div. 408.

§ 2476. Re exclusive jurisdiction of surrogate. Matter of Seaver, 63 App. Div. 283; Matter of Lowndes, 60 Misc. 506. Matter of Fitch, 160 N. Y. 87. Vide pages 56 and 138.

§ 2477. Re concurrent jurisdiction of two or more surrogates in non-resident's estate. Matter of Arnold, 114 App. Div. 244; Matter of Hathaway, 27 Misc. 474. Vide page 139.

§ 2481, Subd. 6. Surrogate has power to vacate or modify decree. Morgan v. Cowie, 49 App. Div. 612; Matter of Earle, 74 App. Div. 458; Matter of Lowry, 89 App. Div. 226; Matter of Barnum, 129 App. Div. 418; Matter of Weiler, 122 N. Y. Supp. 608, affirmed, without opinion, 139 App. Div. 905; Matter of Meyer, 209 N. Y. 386; Matter of Townsend, 153 App. Div. 85; Matter of Wallace, 28 Misc. 603; Matter of Daly, 34 id. 148-152; Matter of Connelly, 38 id. 466-468; Matter of Campbell, 50 Misc. 485; Matter of Eaton, 55 Misc. 472; Matter of Warren, 62 Misc. 444; Matter of Coogan, 162 N. Y. 613; Matter of Silliman, 175 N. Y. 513; Matter of Willets, 190 N. Y. 527; Matter of Scrimgeour, 175 N. Y. 507.

§ 2514, Subd. 13. Re real property. Matter of Vivanti, 63 Misc. 618-620, affirmed as to holding re real property but reversed as to other points, 206 N. Y. 656. Vide etiam Althause, 63 App. Div. 252, affirmed 168 N. Y. 670.

§ 2534. Re verification. Matter of Kelsey v. Church, 112 App. Div. 408-410.

§ 2546. Matter of Bishop, 188 N. Y. 635.

§ 2555. Matter of McGee, N. Y. Law Journal, February 7, 1913, opinion quoted sub Payment of Tax, page 762.

§ 2570. Re appeal to Appellate Division. Morgan v. Warner, 162 N. Y. 612.

§ 2572. Re time within which appeal must be taken to Appellate Division. Matter of Dingman, 66 App. Div. 228-231.

§ 2695 et seq. Re ancillary letters.

Tax Law, § 228 *supra*, page 12; Matter of Grosvenor, 124 App. Div. 331-332, *supra*, page 359.

§ 2712. Matter of Althause, 63 App. Div. 252, affirmed 168 N. Y. 670; Matter of Vivanti, 63 Misc. 618-620 reversed on other points but affirmed as to holding re lease, 206 N. Y. 656.

§ 2713. Re exemption for widow and children. Matter of Libolt, 102 App. Div. 29; Matter of Page, 39 Misc. 220; Matter of Stiles, 64 Misc. 658-662.

§ 2719, Subd. 2. Re taxes assessed on the property of the deceased previous to his death. Matter of Hoffman, 42 Misc. 90, citing Babcock, 115 N. Y. 450-456.

§ 2730. Re commissions of executor or administrator. Matter of Westurn, 152 N. Y. 93; Matter of Gihon, 169 id. 443; Matter of Silliman, 175 N. Y. 513; Matter of Van Pelt, 63 Misc. 616.

§ 2749. Re funeral expenses and headstone. Matter of Maverick, 198 N. Y. 618.

§ 3240. Re costs. Matter of Gibson, 157 N. Y. 680; Matter of Huntington, 168 N. Y. 399-411; Matter of Collins, 104 App. Div. 184; Matter of Babcock, 86 App. Div. 563.

§ 3334. Special proceeding. Amherst College *v.* Ritch, 151 N. Y. 282-342; Morgan *v.* Warner, 45 App. Div. 424-426, affirmed on opinion below, 162 N. Y. 612.

§ 3343. Subd. 18. Re definition of domestic corporation. Matter of Cushing, 40 Misc. 505.

CODICIL

As to tax on transfer of property bequeathed by codicil vide Matter of Myers, N. Y. Law Journal, November 22, 1913, opinion quoted *post*, page 759.

COLLATERAL SECURITY

Vide Schedule A⁴, *supra*, page 116; etiam Pledged Securities.

COLLECTION OF TAX

Vide Matter of Dingman, 66 App. Div. 228; Matter of Meyer, 209 N. Y. 386, *supra*, page 397, and cases cited sub Payment of Tax, *post*, page 757.

COMITY

Vide Laws of Another State.

Unless there are in the statute some provisions which prevent the courts will "pay decent regard to the principles of interstate comity," and will adopt "a policy which will enable each state fairly to enforce its own laws without oppression to the subject." Matter of Cooley, 186 N. Y. 220-228.

Full faith and credit due to proceedings of court of another state do not require that New York courts shall be bound by

adjudication on question of residence. Matter of Tilt, 182 N. Y. 557 reversed in 207 U. S. 43-53, sub nom. *Tilt v. Kelsey*.

"When asked to give full faith and credit to judicial proceedings of another state we are at least entitled to know what those proceedings were; but this record will be searched in vain for proof of any decree of the courts of California, to say nothing of any decree even purporting to bar the claim of the state of New York for a transfer tax. All we have are assertions and allegations on information and belief of conclusions respecting the effect of the proceedings in California." The Appellate Division refused to take judicial notice of the statutes and decisions, reversed the surrogate and remitted the proceedings to him. Matter of Cummings, 142 App. Div. 377, 385, 391.

COMMISSIONS

Commissions of executors, administrators and trustees, *supra*, page 127. Renunciation of commissions discussed in Matter of Van Rensselaer, N. Y. Law Journal, October 11, 1912, opinion quoted, page 680.

Brokers' commissions, page 128.

COMMISSION TO TAKE TESTIMONY

Vide Depositions.

COMMUNITY PROPERTY

Discussion of, in Matter of Majot, 199 N. Y. 29.

COMPOSITION OF TAX

Comptroller has authority under § 233 by and with the consent of the attorney general to compound tax upon certain trust estates where the remainders are not presently taxable. Matter of Kidd, 188 N. Y. 274-277.

COMPROMISE OF CLAIM

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| (1) Comptroller should be made a party. | (3) Assignment of legacy. |
| (2) Settlement of disputed claims to property. | (4) Renunciation of legacy. |

Vide Ownership of Property.

(1) Comptroller should be made a party

"If the title to property ostensibly belonging to a decedent,

but claimed after his death by other persons, could be determined by the agreement of the parties between themselves and without notice to the state comptroller the transfer tax statute could be successfully evaded and its provisions nullified." Matter of Sebastian D. Lawrence, N. Y. Law Journal, February 15, 1913.

"As the effect of compromise agreements entered into between parties claiming the property as executors and parties claiming by title adverse to the decedent would be practically to nullify the provisions of the Transfer Tax Law and permit such property to evade taxation, the courts will critically examine such agreements and the basis of the claim of title adverse to the decedent in order to determine whether such claims are bona fide or are merely presented for the purpose of evading the Tax Law.

"The state comptroller, as the representative of the State, should be made a party to such compromise agreements; and where he is not made a party such an agreement will not be binding upon the State in a proceeding to assess a transfer tax.

"While the state comptroller was not made a party to the compromise agreement executed between the executors and the widow of decedent in the matter under consideration he appeared before the appraiser and made no objection to the introduction in evidence of a copy of the compromise agreement. Neither did he object to that part of the report of the appraiser where the distribution to the widow was made not in accordance with the provisions of the will of the decedent, but in accordance with the terms of the compromise agreement. Such a failure on the part of the attorney for the state comptroller to object to the compromise agreement must be deemed an acquiescence in its validity so far as the imposition of the transfer tax is concerned." Matter of Yerkes, N. Y. Law Journal, December 5, 1912.

(2) Settlement of disputed claims to property

A dispute having arisen as to whether the estate or a stranger thereto was the owner of certain savings bank accounts, a compromise was effected whereby the estate obtained 75% of the accounts. After going into the merits of the compromise Surrogate Thomas held that only the 75% was subject to tax. Matter of Thomas, 39 Misc. 223. In the later case of Marks, 40 Misc. 507, the surrogate pointed out that in the Thomas

case, *supra*, "an asset claimed by the administrator in behalf of the estate was also claimed by a stranger under a title superior to that of the decedent. A compromise was prudently and properly made which recognized the rights of the estate to a portion of the disputed property. * * *

"I remarked it was competent for an administrator to purchase peace 'for the estate' and to charge the disbursement as an expense of administration." In the Marks case, *supra*, \$10,000 paid to a niece of testator pursuant to an agreement under which she withdrew objections to the will was not allowed as a deduction because it was "a payment out of the property transferred to the beneficiaries in satisfaction of their own contract obligation and was not an expense of administering the estate."

Legal effect of compromise with estate by one claiming gift from deceased was to quiet estate's claim and did not affect taxability on ground of gift being *causa mortis*. Matter of Edwards, 146 N. Y. 380.

(3) Assignment of legacy

Assignment of legacy to avoid will contest taxable as though assignment not made. Matter of Cook, 187 N. Y. 253.

In Matter of Aaron S. Baldwin, N. Y. Law Journal, December 11, 1913, Surrogate Fowler held: "The decedent, who was a resident of New York County, died on the 21st of August, 1912. Objections to the probate of his will were filed by certain of his next of kin, and the sum of \$10,500 was paid to such next of kin before the objections were withdrawn and the will admitted to probate. The appraiser refused to allow this sum as a deduction from the taxable assets of the estate, and from the order entered upon his report this appeal is taken by the executor. The appraiser's report does not show the details of the arrangement by which the legatees agreed to pay the contesting next of kin the sum of \$10,500, but as the executor had no authority to make such a payment it must be inferred that the legatees assigned to the next of kin a certain proportion of their respective legacies. But this agreement of compromise did not diminish the assets of the estate. It merely diminished the amount which the legatees received, and this diminution was caused by their own act, not by the will of the decedent. The value of the decedent's estate, less deductions for funeral expenses, debts and expenses of administration was subject to

a transfer tax. The right of the State to a tax upon the interests transferred by the will of the decedent accrued immediately upon his death; the right of the legatees to the legacies bequeathed to them by the decedent accrued at the same time and was governed by the provisions of the will. Therefore, no agreement subsequently executed by the legatees and next of kin could modify the provisions of decedent's will or defeat the right of the State to a tax upon the value of the interests transferred.

"If the legatees, who contributed the sum of \$10,500 paid to the next of kin, had renounced their legacies, they would not be subject to a tax. *Matter of Wolfe*, 89 App. Div. 349. But they did not make such renunciation, and their assignment of a proportionate part of the legacies to the contesting next of kin shows that they accepted them, because there could have been no assignment of a part of the legacies unless they had been previously accepted by the legatees. While the legatees could dispose of their legacies in any manner they desired, they could not by such disposition alter or modify the provisions of decedent's will. As was said by the Court of Appeals in the *Matter of Cook*, 187 N. Y. 254: 'No settlement could change a word that the testator wrote.' The will stands as it was written, and the most solemn instrument executed by all the legatees and next of kin could not convert a bequest to certain legatees into a bequest to persons not mentioned in the will. Therefore, as the transfer of the property was effected by the provisions of decedent's will and the legacies were not renounced by the legatees therein mentioned, the value of the interests so transferred is subject to a tax, without any deduction on account of the amount paid to the contesting next of kin. *Matter of Cook*, *supra*; *Matter of Westurn*, 152 N. Y. 93; *Matter of Marks*, 66 Misc. 395. Order fixing tax affirmed."

(4) Renunciation of legacy

Where suit has been commenced and settlement made whereby legatee renounces a portion of legacy, the portion renounced is not taxable upon the basis of the legatee taking it under the will. *Matter of Merritt*, 155 App. Div. 228. As to right to renounce vide *Matter of Wolfe*, 89 App. Div. 349, page 297, affirmed, without opinion, 179 N. Y. 599.

COMPTROLLER

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| (1) Represents the interests of the state. | (5) Payment of tax. |
| (2) May apply for appraisal of estate. | (6) Transfers of securities, deposits or other assets. |
| (3) Appraisal must be on notice to comptroller. | (7) Should be made party to compromise agreements. |
| (4) Appoints appraisers in certain counties. | (8) Where comptroller not a party to proceeding. |

(1) Represents the interests of the state

The state comptroller represents the interests of the state of New York in transfer tax proceedings. He usually appears in all such proceedings by attorney designated and retained under the provisions of the last sentence of § 235.

(2) May apply for appraisal of estate

The application under the second sentence of § 230 for an order of the surrogate directing an appraiser to fix the fair market value may be made by the state comptroller. The petition may be made upon information and belief. *Matter of Kelsey v. Church*, 112 App. Div. 408.

DISTRICT ATTORNEY PROCEEDING under § 235 is not the only remedy in delinquent estates. The state comptroller may apply for appointment of appraiser after the expiration of eighteen months from the accrual of the tax. *Matter of Pearsall*, N. Y. Law Journal, February 2, 1912, opinion quoted, *post*, page 666.

(3) Appraisal must be on notice to comptroller

Notice of the appraisal must be given to the state comptroller in accordance with the provisions of the second paragraph of § 230. An order exempting an estate from taxation will be set aside if made without notice to the comptroller. *Matter of Collins*, 104 App. Div. 184; *Matter of Schmidt*, 39 Misc. 77.

The appraiser is, by the provisions of the last sentence of § 230, required to file a duplicate of his report in the office of the state comptroller. The surrogate "upon the determination by him as to the value of any estate * * * shall immediately forward a copy of such taxing order to the state comptroller. The surrogate shall also forward to the state comptroller copies of all orders entered by him in relation to or affecting in any way the transfer tax on any estate, including orders of exemption." Third paragraph of § 231.

(4) Appoints appraisers in certain counties

In the counties of Albany, Bronx, Dutchess, Erie, Kings, Monroe, Nassau, New York, Niagara, Oneida, Onondaga, Orange, Queens, Rensselaer, Richmond, Suffolk and Westchester he appoints transfer tax appraisers who may be removed at his pleasure. Section 229; *People ex rel. McNeile v. Glynn*, 128 App. Div. 257; *Matter of Weeks v. Kraft*, 147 App. Div. 403.

(5) Payment of tax

In the said seventeen counties payment is made direct to the state comptroller of the inheritance tax assessed in said counties. Last sentence of § 222. All receipts for the payment of the transfer taxes collected in the said seventeen counties are signed by the state comptroller, and for transfer taxes collected in the other counties of the state his countersignature is required to that of the county treasurer. First sentence of § 236; *People ex rel. Lown v. Cook*, 158 App. Div. 74, affirmed, 209 N. Y. mem.

REAL ESTATE upon which the transfer tax has been paid should have recorded in the office of the county clerk or register of the county where such real estate is situated, a certificate of the comptroller issued under the provisions of the last sentence of § 236. Vide *supra*, page 97.

(6) Transfer of securities, deposits or other assets

Under the provisions of § 227 the delivery or transfer of any securities, deposits or other assets shall be on notice to state comptroller. Vide *supra*, page 57, paragraphs (7), (11), (12) and (13); and *supra*, page 838.

(7) Should be made party to compromise agreements

Vide *Matter of Yerkes*, N. Y. Law Journal, December 5, 1912, and *Matter of Lawrence*, id., February 15, 1913, opinions quoted from sub Compromise of Claim.

(8) Where comptroller not a party to proceeding

For discussion of binding effect of a decision where state comptroller not made a party vide *Tilt v. Kelsey*, 207 U. S. 43, *supra*, page 311, and *Matter of Lawrence*, N. Y. Law Journal, February 15, 1913, *supra*, page 317; etiam *Matter of Edson*, 38 App. Div. 19-21, affirmed, on opinion below, 159 N. Y. 568; *Matter of Willetts*, 119 App. Div. 119-126, affirmed, without opinion, 190 N. Y. 527; *Matter of Kidd*, 115 App. Div. 205-210, reversed on other points, 188 N. Y. 274.

CONCLUSIONS OF FACT

Testimony giving, should be excluded. *Morgan v. Warner*, 45 App. Div. 424-427, affirmed, on opinion below, 162 N. Y. 612.

Vide Testimony.

CONCURRENT JURISDICTION

Vide § 2477 of Code of Civil Procedure and § 228 of Tax Law; Non-Resident Estates, *supra*, page 139.

CONFLICTING CLAIMS TO ESTATE

Vide Compromise of Claim.

CONSENT OF COMPTROLLER

Vide Safe Deposit Box, *post*, page 837, and Transfer of Securities, *post*, page 866.

In NON-RESIDENT estate, vide *supra*, page 135.

CONSIDERATION

Deed given for a consideration not subject to the tax, vide *supra*, page 37.

As to transfer by will vide *Matter of Gould*, 156 N. Y. 423, *supra*, page 224; *Matter of Rogers*, 172 id. 617, *supra*, page 274; *Matter of Kidd*, 188 N. Y. 274, *supra*, page 341; *Matter of Demers*, 41 Misc. 470; *Matter of Riemann*, 42 id. 648-650.

CONSISTENCY

"Perfect consistency is not always practicable in a scheme of taxation that is intended to let nothing escape that can be owned or transferred." *Matter of Whiting*, 150 N. Y. 27-30.

CONSTITUTIONALITY

The original act, Laws of 1885, chapter 483, in effect June 30, 1885, held to be constitutional. *Matter of McPherson*, 104 N. Y. 306.

In *Matter of Merriam*, 141 N. Y. 479, sustained in 163 U. S. 625 sub nom. *United States v. Perkins*, it was held that a legacy to the United States was taxable, the United States Supreme Court saying, page 630: "The act in question is not open to the objection that it is an attempt to tax the property of the United States, since the tax is imposed upon the legacy before it reaches the hands of the government." Similarly it

was held that the transfer of United States bonds was subject to the tax. *Matter of Plummer*, 30 Misc. 19, affirmed, without opinion either in the Appellate Division or the Court of Appeals, 161 N. Y. 631; sustained in 178 U. S. 115, sub nom. *Plummer v. Coler*.

The taxation in a non-resident's estate of a bank deposit in a New York depository upheld. *Matter of Houdayer*, 150 N. Y. 37; *Matter of Blackstone*, 69 App. Div. 127, affirmed 171 N. Y. 682; sustained in 188 U. S. 189, sub nom. *Blackstone v. Miller*. In non-resident estates transfers of bank account made since the 1911 amendment are not subject to tax, vide *supra*, page 133.

In *Matter of Keeney*, 194 N. Y. 281, sustained in 222 U. S. 525, sub nom. *Keeney v. New York*, the statute was attacked as unconstitutional as involving "an arbitrary, discriminatory and unequal tax upon the transfer of property" in two respects. First, that the rate of tax varies according to the relation the grantee bears to the grantor, and, second, that it singles out for taxation transfers where a life estate is reserved to the grantor, leaving all other transfers or conveyances exempt." The constitutionality of the statute was upheld, vide *Keeney case, supra*, page 360.

LAWS 1897, CHAP. 284, in effect April 16, 1897, subd. 6, § 220, held to be constitutional. *Matter of William H. Vanderbilt*, 163 N. Y. 597; *Matter of Dows*, 167 N. Y. 227, sustained in 183 U. S. 278, sub nom. *Orr v. Gilman*; *Matter of Delano*, 176 N. Y. 486, sustained in 205 U. S. 466.

LAWS 1899, CHAP. 76, unconstitutional so far as it attempted to tax estates upon remainder or reversion which vested prior to June 30, 1885. *Matter of Pell*, 171 N. Y. 48; *Matter of Scrimgeour*, 175 N. Y. 507. Vide *post*, page 818.

Held constitutional that portion of § 230 which provides for taxation at the highest rate which would be possible on the happening of any of the contingencies or conditions which are set forth in the transfer in trust or otherwise. *Matter of Cornelius Vanderbilt*, 172 N. Y. 69; *Matter of Brez*, id. 609; *Matter of Tracy*, 179 id. 501. Vide *Remainders, post*, page 822.

LAWS 1900, CHAP. 658, in effect April 25, 1900, providing, *inter alia*, for appointment by State Comptroller of appraisers (now § 229) is not a local act and is constitutional. *Matter of Wallace*, 71 App. Div. 284.

Journals of the two houses established that chap. 41, Laws

1903 was passed with the requisite constitutional number present. *Matter of Stickney*, 185 N. Y. 107, writ of error dismissed, 209 U. S. 419, sub nom. *Stickney v. Kelsey*; *Matter of Weeks*, 185 N. Y. 541.

LAWS 1908, CHAP. 310, in effect May 18, 1908, which added subdivision 3 to § 220 held to be constitutional. *Matter of Porter*, 67 Misc. 19, affirmed, 148 App. Div. 896. For discussion of effect of amendment vide *supra*, page 152.

CONSTRUCTION OF STATUTE

Vide cases cited sub Constitutionality; Doubt; Legislative Declaration; Retroactive.

CONSTRUCTION OF WILL

Extrinsic evidence that legacy impressed with trust does not relieve from tax where court construe absolute legacy to pass under will. *Matter of Edson*, 159 N. Y. 568.

When the surrogate construes will he may hold some of its provisions void, and that therefore tax should be assessed upon transfers to persons entitled to take in intestacy. *Matter of Ullmann*, 137 N. Y. 403-408. Vide Appraiser, *supra*, page 599.

Decree of surrogate binding on questions of taxation only. *Matter of Ullmann*, *supra*; *Amherst College v. Ritch*, 151 N. Y. 282-343.

CONTEMPLATION OF DEATH

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| (1) Definition. | (4) Transfers held not subject to |
| (2) Proceedings taken upon information and belief. | tax. |
| (3) Gifts held taxable under subd. 4, § 220. | (5) Notice to grantee. |

Vide Ante-nuptial Contract; Gift; Property Held in Trust for or jointly with Others; Trust Deed.

(1) Definition

"The words 'in contemplation of the death' do not refer to the general expectation which every mortal entertains, but rather the apprehension which arises from some existing condition of body or some impending peril." *Matter of Baker*, 83 App. Div. 530-533, affirmed, on opinion below, 178 N. Y. 575; *Matter of Spaulding*, 163 N. Y. 607; *Matter of Hess*, 187 N. Y. 554. Vide etiam, *supra*, page 35.

"THE PECULIAR OPERATION OF A PARTICULAR PERSON'S MIND at a particular time and while transacting a particular kind of business is something which is not susceptible of direct proof, nor is it within the realm of expert analysis, and if the application of this statute (subd. 4 of § 220) is surrounded by grave difficulties, dependent to a certain extent upon the psychological speculations of the appraiser who is prosecuting the investigation, the remedy lies with the legislature and not with the courts." Matter of Crary, 31 Misc. 72-75.

Under the original statute the words "in contemplation of death" did not appear. Matter of Edwards, 85 Hun, 436, *supra*, page 194, affirmed, without opinion, 146 N. Y. 380. They were first introduced by Laws 1891, chap. 215, in effect April 20, 1891. Matter of Edgerton, 35 App. Div. 125-128, *supra*, page 227, affirmed, without opinion, 158 N. Y. 671.

(2) Proceeding taken upon information and belief

"If reliable information is brought to the attention of the surrogate that a decedent had transferred his property in contemplation of death, it would seem from the provisions of § 230 that the surrogate, 'upon his own motion,' could enter an order referring the appraisal of the property so transferred to the official appraiser.

"Whenever such information is given to the state comptroller or the attorney representing him in the county where the decedent was a late resident, it is the practice for the comptroller's attorney to prepare a petition on behalf of the comptroller, alleging upon information and belief the facts in support of such transfer in contemplation of death, and present the same to the surrogate, praying for an order designating the official appraiser to fix the fair market value of the property the transfer of which may be subject to taxation, and the usual proceedings then follow." State comptroller's opinion, dated April 16, 1913, 2 State Department Reports, 497-500.

(3) Gifts held taxable under subd. 4, § 220

DEEDS DELIVERED, WITHOUT CONSIDERATION, to nieces a few days before death of decedent who was seventy-nine years of age, ill with consumption, held to be made in contemplation of death and taxable. Matter of Birdsall, 22 Misc. 180-191, affirmed, without opinion, 43 App. Div. 624.

Ten days before his death decedent, who was seventy-six,

delivered to his adopted son deeds to real estate appraised at \$261,000. He had made his will some eight years previously by which he devised the property to his said adopted son so if the adopted son had not acquired the land by the deeds, he would have received it by devise. Decedent had been suffering from a chronic disease for over two years prior to his death. Surrogate Beckett held that there was a gift made in contemplation of death within the meaning of subdivision 4 of § 220, and that the \$261,000 worth of land was taxable. He said in the course of his opinion: "The deeds to the real estate were executed by the decedent, delivered to the grantee and duly recorded by him. It was, therefore, an absolute transfer of the real estate. * * * To prove that property is transferred in contemplation of death is exceedingly difficult, as the only parties whose intimacy with a decedent would afford them an opportunity of being cognizant of his intentions are usually those whose interests would be served by testimony to the effect that the gift was not made in contemplation of death, and the State is, therefore, compelled to rely upon conclusions derived from the testimony of witnesses who are interested in disproving its contention. It is also in large measure the attempted proof of the operations of a man's mind." *Matter of Price*, 62 Misc. 149-152.

IN *MATTER OF MARY DELANEY*, N. Y. Law Journal, August 16, 1913, Surrogate Cohalan held: "Appeal from an order fixing tax. The appraiser found that an assignment of mortgage for \$13,000 made by the decedent to her daughter, Nellie B. Reed, about two years before the death of the decedent was a gift made in contemplation of her death. The evidence taken before the appraiser does not sustain this finding. He also found that a conveyance of premises made by the decedent to her son about two months before her death was subject to tax as a gift made in contemplation of death. The decedent at the time she conveyed the premises to her son was 81 years of age and was being attended by a physician. These circumstances raise a presumption that she must have contemplated the probability of her early dissolution at the time she conveyed the premises to her son. The appraiser was therefore correct in holding that the gift to decedent's son was taxable. The order fixing tax will be modified by exempting the interest of Nellie B. Reed in decedent's estate."

IN *MATTER OF DEE*, N. Y. Law Journal, December 6, 1913, Surrogate Ketcham held: "This appeal presents the question

whether a gift made by the decedent, which was consummated by every ceremony essential to a gift *inter vivos*, was taxable as a gift made 'in contemplation of the death of the * * * donor,' (Tax Law, sec. 220). While, after some confusion of authority, it is now fairly established that such gifts may be taxable it is not essential in this case to consider all the varying conditions which may lead to the imposition of the tax. Two facts, appearing without denial or qualifications, require the finding that in this case the transfer was 'in contemplation of death' and is taxable.

"The donor was a physician living in the household of the donee. Prior to the gift, in speaking of the donee and her husband to the one witness whose statement is submitted, the decedent said that the 'only relations he had was the people in the house and that is the only people he had and the people that took care of him, * * * and if anything should happen to him that he would see that they would be well taken care of for the rest of their days, because they had treated him just the same as a mother or father.' The decedent, having delivered the gift at about 10:30 in the evening, was observed at 12 o'clock of the same night by this witness, who says: 'When I came down in his office he had them things the doctor has to test his chest, testing his chest, and when he saw me he dropped them, and I asked him was he ill, and he said no.' Except for this statement, the decedent was apparently in his ordinary health when the gift was made. At about 2 o'clock the following morning he was found upon the stairs of his dwelling, dead. The cause of his death is not shown. Where a gift was bestowed by a physician who was on the same evening making a stethoscopic examination of his own chest and who had long intended to make provisions for the donee, to take effect on his death, and except for such gift had made no such provision, the transfer, though *inter vivos*, is taxable. The order is affirmed."

(4) Transfers held not subject to tax

STOCK was endorsed over by husband to his wife three years before his death, but no transfer was made on books of corporation and dividends on the stock were paid to him. He delivered the stock to his wife, and she put it back in his safe deposit box, the key of which he delivered to her and she subsequently paid the rental. The dividends he paid over to her. *Held*,

that the transfer was not in contemplation of death and not taxable. *Matter of Graves*, 52 Misc. 433.

ASSIGNMENT OF STOCK by husband to wife three weeks before his death held by divided court not to be taxable under the circumstances of the case. *Matter of Mahlstedt*, 67 App. Div. 176, appeal dismissed, 171 N. Y. 652.

IN *MATTER OF MARY F. McKEON*, N. Y. Law Journal, June 8, 1911, Surrogate Cohalan held: "The question which this appeal presents for determination is whether the real estate conveyed by the decedent prior to her death is subject to a transfer tax. The decedent died in December, 1908. On August 13, 1908, she executed and delivered to one William H. Murphy as trustee, two deeds by which she conveyed to him certain parcels of real estate. It was provided in the deeds that the trustee should apply the income from the real estate to the support, education and maintenance of the grantor's daughter until she arrived at the age of 21. If the daughter attained that age she became entitled to the property absolutely. It was further provided that the trustee should pay to the grantor from the rents and profits of the real estate a reasonable allowance for her support and that this allowance should constitute a lien upon the property conveyed. The trustee was given power to sell, mortgage or lease the property, and to execute and deliver proper instruments to effect either of these purposes. The appraiser reported that the value of this real estate was taxable against decedent's daughter.

"As the property did not pass by will or by the intestate laws its transfer would not be subject to tax—unless it appeared that it was conveyed by the grantor in contemplation of her death or that the deeds were made with the intention that they should not take effect until at or after the grantor's death. It appears from the evidence taken before the appraiser that at the time the deeds were executed the grantor was ill, although apparently not seriously indisposed, and that a physician occasionally attended her. But it also appears that she did not know the nature of the disease from which she suffered, and that she did not say anything which would indicate that she apprehended her dissolution in the immediate future. Her explanation of the conveyance of her real estate to the trustee was that she wished to place the property beyond the reach of her husband; that her health was not sufficiently good to enable her properly to attend to the care and preservation of the property

or to the collection of the rents, and that she desired to make provision for the education and maintenance of her minor daughter. Neither her physical condition at the time she executed the deeds nor the purposes which she wished to accomplish by their execution would indicate that the property was transferred while she actually apprehended her dissolution.

"The words 'in contemplation of death' as used in the Transfer Tax Law, do not refer to that general expectation of death which every mortal entertains, but rather to that apprehension which arises from some existing condition of body or some impending peril. While the decedent died about four months after the time she executed the deed, there is no evidence to show that her physical condition was such as to induce her to believe at the time of the execution of the deeds that she would die within a comparatively short time. In fact there is no evidence whatever to indicate that her apprehension of approaching dissolution prompted her to execute the deeds or that the conveyance was made for the purpose of evading the payment of the transfer tax. The evidence, therefore, is not sufficient to support a finding that the property was conveyed by the decedent in contemplation of death (*Matter of Spaulding*, 49 App. Div. 541, *aff'd* 163 N. Y. 607).

"That the conveyance was not made to take effect at or after the death of decedent is apparent from the deeds themselves. They were absolute in form, the grantee was given the power to sell, mortgage or lease the premises, no power of revocation was reserved to the grantor. Therefore, as soon as the deeds were delivered to the trustee the title vested absolutely in him. The relation of the cestui que trust to the property was not in any way affected by the death of the grantor. Her title was neither enlarged nor diminished by that event. The trustee had absolute power over the property until the cestui que trust arrived at the age of 21, when it became his duty to convey it to her. The execution and delivery of the deeds therefore constituted a valid gift inter vivos of the property therein described, and it was not subject to a transfer tax upon the death of the grantor (*Matter of Hess*, 110 App. Div. 476, *aff'd* 187 N. Y. 554; *Matter of Thorne*, 44 App. Div. 8; *Matter of Masury*, 28 App. Div. 580, *aff'd* 159 N. Y. 532). Order fixing tax reversed."

IN *MATTER OF HERMANN AHRENS*, N. Y. Law Journal, May 14, 1913, Surrogate Fowler held: "The transfer tax ap-

praiser found that the decedent transferred to his wife certain real estate of the value of \$43,000, and that the transfer was intended to take effect at or after his death. The executor of the estate has appealed from the order assessing a tax upon this property.

"The decedent died on the 3d of January, 1912. On the 9th day of December, 1911, he executed and delivered the deeds conveying the real estate to his wife and they were recorded in the Register's office of this county on the following day. The deeds to the property were a gift from the decedent to his wife, the consideration being natural love and affection, but they were absolute conveyances without any conditions or limitations, and vested the title absolutely in the grantee as soon as they were delivered to her. Therefore they constituted and effected an absolute transfer of the property therein mentioned, and the appraiser erred in finding that the gift was intended to take effect at or after death. But although the appraiser's finding is incorrect, the order fixing tax will not be reversed upon this appeal if the appraiser's report shows that the transfer of the property is taxable under any other provision of the Transfer Tax Law.

"While there was absolute conveyance of the property and transfer of title prior to the death of the decedent, it would nevertheless be taxable if it were transferred by the decedent as a gift in contemplation of death (subdivision 4 of § 220 of the Tax Law). The phrase 'in contemplation of death' as used in the transfer tax statute does not refer to that general expectation of death which every mortal entertains, but rather to the apprehension of death which arises from some existing condition of body or some impending peril (*Matter of Baker*, 83 App. Div. 530).

"The evidence adduced before the appraiser on behalf of the estate shows that the decedent was under the care of a physician in September, 1911, although not confined to bed; that in November he was visited by his attorney, who found him in bed and under the care of a physician; that he was visited several times in December by the pastor of the church to which he belonged and that he spoke to the pastor "about the time he expected to be out again and attending to his duties as a member of certain church organizations." The family physician who attended him made an affidavit to the effect that he did not tell the decedent the nature of his disease or the hopeless-

ness of his case until a few days before his death. He died from cancer. There was no evidence that the decedent had consulted a specialist, or that he had been examined by any other physician than his family physician.

"Had the family physician been cross-examined it might have developed that the decedent had consulted a specialist or some other physician who could have informed him of the nature of the disease from which he was suffering. No evidence was adduced, nor were any witnesses examined on behalf of the State Comptroller. There was no evidence before the appraiser as to the physical condition of the decedent on the day when he executed the deeds or on the preceding days, although the decedent's wife testified before the appraiser in behalf of the estate and might have been cross-examined so as to bring out these material facts. No evidence of the age of the decedent at the time of his death was submitted to the appraiser, and this was a material omission, because if he had arrived at an age when even ordinarily healthy men cannot in the course of nature expect to prolong their existence beyond a brief period, the court would require less direct and positive testimony of his condition and the facts and circumstances surrounding the execution of the deeds in order to sustain a finding that he had in mind when making the gift the probability of his early demise.

"THE BURDEN OF PROVING that the gift was made in contemplation of death was upon the State Comptroller (Matter of Palmer, 117 App. Div. 160); and while the nature of the case rendered it exceedingly difficult for him to obtain direct and positive proof, he could by an intelligent cross-examination of the witnesses produced on behalf of the estate have obtained some evidence of the material facts herein referred to. There was therefore no evidence before the appraiser from which it could reasonably be inferred that the transfer of the real estate was made by the decedent in contemplation of his death (Matter of Mahlstedt, 67 App. Div. 176).

"As the evidence adduced before the appraiser does not sustain his finding that the real estate conveyed by the decedent to his wife was transferred as a gift intended to take effect at or after death, and is insufficient to warrant a conclusion that it was a gift in contemplation of death, the order fixing tax will be modified by reducing the taxable value of the estate by the sum of \$43,000." Vide Burden of Proof, *supra*, page 604.

(5) Notice to grantee

"The appeal by the state comptroller from so much of the order as omitted to assess a tax upon the value of real property alleged to have been conveyed by the decedent, 'in contemplation of death,' presents an interesting question, which should not be passed upon without notice to the grantee of that property, who is not shown to have had any notice of the proceeding, and against whom the tax must be assessed, if at all. The matter will be remitted to the appraiser for further proceeding, and report as to the taxability of the transfer of this real property." *Matter of Wood*, 40 Misc. 155-156. *Vide supra*, page 77.

CONTEMPT

In *Matter of Kennedy*, 113 App. Div. 4, witness refused to answer question regarding gifts from decedent. The court say: "A witness refusing to answer a material question can be punished for contempt, and the surrogate, if applied to for that purpose, would undoubtedly have exercised the power in such a way that the offense would not have been repeated thereafter." The appraiser had fixed tax without first having the record clear that property belonged to decedent, and the Appellate Division remitted the matter for reassessment.

Where executor refused to furnish information to appraiser on ground that decedent was non-resident and the information sought was concerning non-taxable assets, an order adjudging executor in contempt reversed because executor should not be compelled to answer until the question of residence had been determined. *Matter of Bishop*, 82 App. Div. 112. The surrogate may, under § 2546 of Code of Civil Procedure, appoint a referee to take evidence as to residence. *Matter of Bishop*, 111 App. Div. 545, *supra*, page 343.

SECTION 837 OF CODE OF CIVIL PROCEDURE held not to justify executor in refusing to answer proper questions regarding property of decedent. *Vide* last paragraph of digest of *Matter of Lord*, 186 N. Y. 549, *supra*, page 335.

CONTINGENT INTERESTS

For discussion of contingent remainders *vide* *Matter of Smith*, 150 App. Div. 805. *Vide* *Remainders*.

CONTRACT

STATUTE held not to constitute a contract. *Matter of Vander-*

bilt, 50 App. Div. 246-250, affirmed, on opinion below, 163 N. Y. 597.

CONTRACT LIABILITY of decedent, vide Deductions.

CONTRACT TO LEAVE PROPERTY BY WILL vide Matter of Kidd, 188 N. Y. 274, *supra*, page 341; Matter of Demers, 41 Misc. 470, discussed sub Ante-nuptial Contract.

CONTROVERSY, SUBMISSION OF

Code of Civil Procedure, § 1279, provides for submission of a controversy upon an agreed statement of facts. Catlin *v.* Trustees of Trinity College, 113 N. Y. 133; Isham *v.* N. Y. Assn. for Poor, 177 N. Y. 218; Brown *v.* Lawrence Park Realty Co., 133 App. Div. 753.

CONVERSION

Vide Equitable Conversion.

COOPER UNION

Testator, who died in 1901, bequeathed \$5,000 to Cooper Union, and the transfer was held taxable although the charter of Cooper Union exempts its endowments from taxation. Matter of Kucielski, 144 App. Div. 100.

COPARTNERSHIP.

Vide Partnership.

CORPORATIONS

Vide Closely Held Stock; Stock; Transfer of Securities; Schedule A⁴, *supra*, page 112.

CORPUS OF TRUST ESTATES

Referring to the sixth paragraph of § 230 the court said in Matter of Tracy, 179 N. Y. 501-510, "the legislative intention is clear that the transfer tax shall be paid out of the *corpus* of the trust estates, and not out of the income." Vide etiam Matter of Hoyt, 44 Misc. 76; Matter of Vanderbilt, 172 N. Y. 69-73; Matter of Title Guarantee & Trust Co., 81 Misc. 106-112; Matter of White, 208 N. Y. 64; Matter of Bass, 57 Misc. 331.

COSTS

SURROGATE CANNOT AWARD COSTS, the words in the first sentence of § 232, "but no costs shall be allowed by the surrogate

on such appeal," being added by chap. 310, Laws 1908, in effect May 18, 1908. Prior to this amendment the awarding of costs by surrogate was controlled by § 3240 of Code of Civil Procedure. *Matter of Eaton*, 55 Misc. 472.

APPELLATE DIVISION refused to grant costs in reversing order of surrogate, the unsuccessful party not having contested the matter before surrogate. *Matter of Collins*, 104 App. Div. 184.

On appeal to Appellate Division from final order the provisions of § 3240 of Code of Civil Procedure apply, while on an appeal from an order not final the provisions of § 3236 and subdivision 3 of § 3251 apply. If costs are awarded, disbursements under § 3256 are included as a matter of course. *Matter of Babcock*, 86 App. Div. 563.

Appellate Division and Court of Appeals in its discretion, may refuse to award costs against the unsuccessful party, under § 3240 of Code of Civil Procedure. *Matter of Huntington*, 168 N. Y. 399-411; *Matter of Chappell*, 151 App. Div. 774-776.

May award only small amount of costs where limited amount involved. *Matter of Purdy*, 24 Misc. 301-303.

May be awarded to each respondent appearing by separate attorneys. *Matter of Gibson*, 33 App. Div. 628, affirmed, 157 N. Y. 680.

DISTRICT ATTORNEY PROCEEDINGS UNDER § 235. In *Matter of Brady*, N. Y. Law Journal, February 5, 1913, district attorney proceedings were instituted under § 235 and in dismissing the proceedings the surrogate awarded costs against the state comptroller under § 2561 of the Code of Civil Procedure.

District attorney entitled to costs of not over \$100 where there has not been a contest, and to costs of not over \$250 where there has been a contest.

CO-TENANT

Vide Deductions, *post*, page 658.

COUNSEL FEES

Will be allowed as a deduction. Vide Schedule B², *supra*, page 126.

IN NON-RESIDENT estate vide page 147.

THE STATE COMPTROLLER is authorized by the provisions of the last sentence of § 235, *supra*, page 24, "to designate and retain counsel."

COUNTY

IN RESIDENT ESTATES the county where the decedent was a resident at the time of his death is the proper county to bring transfer tax proceedings. Tax Law, § 228 and subd. 1 of § 2476 of Code of Civil Procedure. Vide Procedure *supra*, page 56.

As to NON-RESIDENT ESTATES vide Matter of Hathaway, 27 Misc. 474, and *supra*, page 137.

COUNTY CLERK

It is the duty of the county clerk, except in the counties where the registers perform the duties of the county clerks with respect to the recording of deeds, to make report to state comptroller "of any deed or other conveyance filed or recorded in his office, of any property, which appears to have been made or intended to take effect in possession or enjoyment after the death of the grantor or vendor." Section 239. Vide Gift; Trust Deed.

CERTIFICATE re real estate to be recorded in office of county clerk, vide last sentence of § 236, and *supra*, page 97.

Quarterly report of, vide § 239, *supra*, page 27.

COUNTY TREASURER

ACTS AS APPRAISER except in the seventeen counties of Albany, Bronx, Dutchess, Erie, Kings, Monroe, Nassau, New York, Niagara, Oneida, Onondaga, Orange, Queens, Rensselaer, Richmond, Suffolk and Westchester. First sentences of §§ 229 and 230.

TAX MUST BE PAID TO COUNTY TREASURER except in the above-mentioned seventeen counties. Section 222; People ex rel. Lown *v.* Cook, 158 App. Div. 74, aff'd, without opinion, 209 N. Y. mem. Vide fifth sentence of § 243, *supra*, page 31.

Section 230 authorizing County Treasurer to act as appraiser is constitutional, although by § 237 his fees are based upon the amount of the tax. Matter of Fuller, 62 App. Div. 428.

Receipts issued by, § 236, *supra*, page 25.

Quarterly report of, vide § 240, *supra*, page 27.

COURT OF APPEALS

Vide Appeal; Costs.

The Court of Appeals Decisions, *supra*, page 159.

COUSIN

Entitled to one thousand dollars exemption and subject to the rates of tax set forth in subd. 2 of § 221a; *supra*, page 47.

CURTESY

Curtesy not subject to tax prior to 1911 amendment. Matter of Starbuck, 63 Misc. 156, affirmed, 201 N. Y. 531. Vide Matter of Green, 144 App. Div. 232, and Matter of Andrews, N. Y. Law Journal, February 21, 1912, quoted sub Husband.

As to NON-RESIDENT estates vide *supra*, page 36.

By Laws 1911, chap. 732, in effect July 21, 1911, § 243 was amended by adding to it what now forms the last sentence of said section. In the case of an intestate dying subsequent to July 21, 1911, it was held that the husband's estate by curtesy did not vest until the death of his wife, and that the value of such estate was subject to the tax. Matter of Matilda Beckhardt, N. Y. Law Journal, June 7, 1913.

DEBTS OF DECEDENT

Vide schedule B³, *supra*, page 129; Deductions; Pledged Securities.

As to NON-RESIDENT estate vide *supra*, page 147.

DEBTS DUE DECEDENT

Vide Schedule A³, *supra*, page 109 and page 111. Vide Chose in Action, page 609.

DECEDENT ESTATE LAW

The Decedent Estate Law, chap. 13 of the Consolidated Laws, volume 1, pages 497-522, as amended, is set forth, *supra*, page 535.

Surrogate of Broome County in Matter of Crary, 31 Misc. 72 (1900), upheld the appraiser in placing the value of the stocks by taking the average sales of the same for the three months next prior to decedent's death, basing his decision upon § 1, chap. 34, Laws 1891, now § 122 of Decedent Estate Law, *supra*, page 561.

It was held that this section of the Decedent Estate Law was applicable in the valuation of stocks and bonds, Surrogate Cohalan holding in Matter of Kennedy, N. Y. Law Journal, March 8, 1911, that the appraiser "should have ascertained the average prices at which the securities were sold within a reasonable time before and after decedent's death and made his calculations upon that basis. He should have ascertained the value of the active securities in the manner prescribed by

section 1, chapter 34 of the Laws of 1891, and the average price of these securities for a period of two months before and two months after decedent's death would represent the fair market value of these securities at the date of decedent's death."

Vide Schedule A⁴, *supra*, page 113.

The surrogate of Sullivan County held, in *Matter of Proctor*, 41 Misc. 79, that where sales of stock were made in the regular and usual course of business, and some of them at auction, it was proper for appraiser to receive testimony as to sales during year of decedent's death, although the stock was inactive and sales infrequent. Vide *supra*, page 628.

NOT CONTROLLING in valuing inactive stock. *Matter of Curtice*, 111 App. Div. 230, affirmed, without opinion, 185 N. Y. 543. Vide cases cited sub Closely Held Stock.

IN NON-RESIDENT ESTATES the disposition of New York real estate is regulated by the laws of this state. Section 47 of Decedent Estate Law; *Matter of Turner*, 82 Misc. 25-28.

DECREE OF SURROGATE

Vide Vacating Decree; Surrogate.

Declaring estate exempt from tax, page 84; fixing tax, page 50; non-resident estates, page 157.

DEDUCTIONS

- | | |
|--|-----------------------|
| (1) Administration and funeral expenses. | (5) Debts. |
| (2) Ante-nuptial contract. | (6) Mortgages. |
| (3) Contract liability. | (7) Blanket mortgage. |
| (4) Cotenant's advancements. | (8) Taxes. |
| | (9) Non-resident. |

(1) Administration and funeral expenses

Discussion of, sub Schedules B¹ and B² *supra*, pages 124 and 125.

FEDERAL INHERITANCE TAX not allowed as deduction. *Matter of Gihon*, 169 N. Y. 443; *Matter of Becker*, 26 Misc. 634-635; *Matter of Irish*, 28 id. 647; *Matter of Curtis*, 31 id. 83.

INHERITANCE TAX IN FOREIGN STATE not to be deducted. *Matter of Kennedy*, 20 Misc. 531; *Matter of Penfold*, 81 id. 598.

(2) Ante-nuptial contract

Claim is in nature of debt against the estate and as such is enforceable like any other debt. *Matter of Baker*, 83 App. Div.

530, affirmed, on opinion below, 178 N. Y. 575. Vide cases cited sub Ante-nuptial Contract.

(3) Contract liability

Contracts were entered into by decedent, who died in 1893, and the question arose as to whether there should be allowed as a deduction the amount of the contract liabilities. From the printed papers on appeal, *Matter of Kemp*, 7 App. Div. 609, affirmed, on opinion below, 151 N. Y. 619, it appears that at the time of his death testator was erecting a large building upon real property owned by him and had many contracts with builders and for materials to be paid at future dates. At the time of his death there was unpaid upon said contracts the sum of \$251,051.90, said amount not being then due or earned. The surrogate, whose order as to this ruling was affirmed, said: "In refusing to deduct from the amount of personal property the sum paid by the executors in carrying out the contract made by the decedent for the erection of buildings upon real property owned by him, the appraiser acted properly."

In *Matter of Gustav Amsinck*, N. Y. Law Journal, February 21, 1913, Surrogate Fowler held: "This is an appeal by the executors from the order fixing tax upon the estate of the above named decedent, according to the transfer tax appraiser's report, which refused to allow as a debt of decedent the sum of \$43,000, being the amount of a contract entered into by decedent in his lifetime for alterations to a specific piece of real estate owned by decedent at the time of his death. The premises referred to are specifically devised by the testator to his widow, and it is contended by the executors that the contract for the expenditure of the amount stated was entered into by the decedent in his lifetime, and was a debt upon which a recovery could be had if an action were brought against the testator in his lifetime, or after his death, against his executors. The fact that this indebtedness was incurred for any specific piece of real estate, and that that piece of real estate should therefore be charged with this payment, does not seem to be a correct view to take of the transaction. There was no evidence offered before the appraiser to show that the contract was not a valid debt against the decedent's estate, and in the absence of this proof it must be accepted as a valid debt against his estate; and being proved as a valid debt against his estate, it was a valid debt against all of his estate and not against any specific part of it. Accordingly, the

appeal is sustained, and this debt declared to be a valid debt of decedent chargeable against his whole estate, and the report of the transfer tax appraiser should be remitted for the purpose of correction in the respect noted."

It would seem that if the expense of improvements to the property of decedent is to be deducted, that the property should be appraised with the improvements. It hardly seems equitable to say that the expense of the improvements should be deducted from the assets of the estate, but the value of such improvements should not be taken into consideration.

ANNUITY. In *Matter of Daniell*, 40 Misc. 329, the decedent, four years before his death, entered into an agreement between himself, his wife and a third person as trustee whereby he agreed to pay his wife an annuity, and the agreement further provided that upon his death the trustee might (if the wife elected to do so) demand payment of a gross sum to be calculated upon her probable duration of life according to the Northampton Tables. The wife accepted this agreement in lieu of all claims for support and in lieu of dower as well as in lieu of any claim to a distributive share of the decedent's estate. The will recited the agreement, and authorized the executors, in case his wife should not elect to receive a gross sum in lieu of said annuity, to set aside a sum sufficient to pay annuity. The appraiser refused to deduct value of annuity, the wife not having elected to take a gross sum; the surrogate reversed appraiser and held that the value of the annuity be deducted from taxable value of estate.

LEASE, vide Schedule B³, *supra*, page 132.

(4) **Cotenant's advancements**

COTENANT'S ADVANCEMENTS for necessary and lasting improvements on the common property, although made thirty-years before death of decedent by the ancestor of the cotenants of the decedent, held by Surrogate Brown, Monroe County, to be deductions that should be made from decedent's interest in the real estate held by decedent and others as tenants in common. *Matter of Wood*, 68 Misc. 267.

(5) **Debts**

Vide Schedule B³ *supra*, page 129.

Etiam third sentence of § 225, *supra*, page 10, and the first sentence of said section cited *post*, page 880.

(6) Mortgages

Should be set forth under Schedule A¹, *supra*, page 101.

MORTGAGES to be deducted from real estate and not from personal estate of decedent. *Matter of Sutton*, 3 App. Div. 208-212, affirmed, on opinion below, 149 N. Y. 618; *Matter of Livingston*, 1 App. Div. 568; *Matter of Maresi*, 74 App. Div. 76-79.

Cases have held that even though will contains a direction that mortgages be paid out of personalty still for transfer tax purposes the deductions should be made from the value of the real estate. *Matter of Offerman*, 25 App. Div. 94; *Matter of Murphy*, 157 N. Y. 679; *Matter of De Graaf*, 24 Misc. 147-149.

The case of *Berry*, 23 Misc. 230, calls attention to the Real Property Law now § 250, and says "there does not seem to be any necessity for reading the two statutes together."

Bond and mortgage should be deducted from value of mortgaged premises and not from personal estate. *Matter of Murphy*, 157 N. Y. 679; *Matter of Maresi*, 74 App. Div. 76-79.

(7) Blanket Mortgage

In *Matter of Michael Tremberger*, N. Y. Law Journal, March 7, 1912, the decedent in his lifetime owned two parcels of real estate, and conveyed one of them to his wife subject to one-half of a mortgage then existing on both parcels. Surrogate Fowler held that only one-half of the mortgage should be deducted from his estate, unless it should appear that the value of the one-half conveyed to his wife was less than the one-half of the mortgage subject to which it was conveyed, the Surrogate saying: "The executrix of the estate of decedent appeals from the order assessing a tax upon his estate.

"The decedent, who was a resident of New York, died on the 18th of May, 1910. On the 23d day of May, 1907, he purchased the premises known as Nos. 430 and 432 Wales avenue, in the Borough of the Bronx, City of New York, subject to two mortgages aggregating \$10,500. On the same day he conveyed to his wife, Wilhelmina Tremberger, the premises No. 430 Wales avenue, subject to one-half of the two mortgages aggregating \$10,500. Neither in the deed by which the premises were conveyed to the decedent, nor in the deed by which he conveyed No. 430 to his wife, did the grantee assume the mortgage or agree to pay the mortgage indebtedness, but the premises were in each case conveyed subject to the existing mortgages. The ap-

praiser ascertained the value of the premises No. 432 Wales avenue, of which the decedent died seized, and deducted therefrom \$5,250, this sum being one-half of the amount of the mortgages covering Nos. 430 and 432 Wales avenue. The executrix contends that the appraiser had no authority to deduct one-half of the aggregate of the two mortgages from the value of the premises of which the decedent died seized, and alleges that the entire amount of the two mortgages should be deducted from that part of the mortgaged premises of which the decedent died seized.

"Section 230 of the Transfer Tax Law provides that the appraiser shall appraise the property of decedent at its fair market value at the date of decedent's death. His powers and duties are of a quasi-judicial character, and he may take such proof as will enable him to report to the surrogate the clear market value of the property of which the decedent died seized or possessed (*People ex rel. McKnight v. Glynn*, 56 Misc. 35). Therefore, the appraiser had the right to procure such information and ascertain such facts as would enable him to determine the value of decedent's interest in the premises.

"As the decedent took the entire parcel known as Nos. 430 and 432 Wales avenue subject to the mortgages aggregating \$10,500, but did not assume or promise to pay the mortgage indebtedness, and as the decedent's grantee took the premises No. 430 Wales avenue subject to one-half of the mortgages covering the entire parcel, but did not agree to pay any part of the mortgage indebtedness, the mortgagee could not, in the event of the mortgage being foreclosed and the premises sold for less than the mortgage indebtedness, obtain a deficiency judgment against the legal representative of the decedent or against his grantee (*Stebbins v. Hall*, 29 Barb. 524; *Argall v. Pitts*, 78 N. Y. 239; *Smith v. Truslow*, 84 N. Y. 660). While no act or agreement of the original mortgagors, or their successors in interest, could change or impair the lien of the mortgage upon all the land covered by it, yet as between the decedent and his grantee the premises conveyed by him subject to one-half of the existing mortgages would be liable for the full amount of the mortgage indebtedness subject to which it was conveyed (*Hagg v. Rose*, 183 N. Y. 182). If the value of such premises at the date of decedent's death exceeded the amount of the mortgage subject to which it was conveyed, no deduction on account of such mortgage indebtedness should be made from the value of that

part of the mortgaged premises of which the decedent died seized. But if the value of such premises was less than the amount of the mortgage subject to which they were conveyed by decedent, then, as in the event of a deficiency on foreclosure there would be no personal liability on the part of the decedent or his grantee, the difference between the value of the premises and the amount of the mortgage indebtedness subject to which they were conveyed by the decedent should be deducted from the value of that part of the mortgaged premises of which the decedent died seized. But as the appraiser's report does not contain any evidence as to the value of the premises No. 430 Wales avenue, it is impossible for the court to determine whether the appraiser was justified in deducting only one-half of the mortgages from that part of the mortgaged premises of which the decedent died seized. The appraiser's report should therefore be remitted to him for the purpose of ascertaining the value of the premises conveyed by the decedent subject to one-half of the mortgages covering the entire plot; and in the event of such value being less than the amount of the mortgages subject to which it was conveyed, to correct his report as herein indicated."

UPON THE AMENDED REPORT in the Tremberger case, Surrogate Fowler, N. Y. Law Journal, October 31, 1913, held: "This is an appeal by the executrix of the decedent from the report of the transfer tax appraiser and the order entered thereon. The decedent in his lifetime was the owner of the premises known as Nos. 430-432 Wales avenue, Borough of the Bronx. It appears from a certified copy of a deed, with the proofs annexed to the appraiser's report, filed herein on December 17, 1911, the said premises, forming a plot fifty feet front and rear and one hundred feet on each side, were conveyed to him by a deed dated and recorded May 22, 1907. The premises thus conveyed to him were described by one description in said deed, and were conveyed subject to two mortgages, each covering the entire premises, aggregating in amount \$10,500. In like manner, among the proofs annexed to said report a certified copy of the deed is found dated May 23, 1907, and recorded May 24, 1907, by which the decedent herein, Michael Tremberger, conveyed to Wilhelmine Tremberger the premises known as No. 430 Wales avenue, being a plot twenty-five feet front and rear and one hundred feet on either side.

"This deed contains the following provision: 'Subject to one-

half of the amount of two mortgages aggregating the sum of \$10,500 covering the premises conveyed and the premises adjoining on the north known as No. 432 Wales avenue.' From this it appears that the decedent in his lifetime apportioned the mortgages on the two lots owned by him on the occasion of the conveyance of one of them. The contention of the appellant that the appraiser made the apportionment fails, because, as just shown, the decedent made it himself, and the appraiser apparently accepted this apportionment as binding upon the executrix herein, and consequently upon him in the preparation of his report. Order fixing tax affirmed."

(8) Taxes

Not to be deducted where decedent dies before books closed for correction. *Matter of Maresi*, 74 App. Div. 76; *Matter of Freund*, 143 App. Div. 335, affirmed, 202 N. Y. 556.

When so far completed that the name of the person designated as owner cannot be changed or altered by the assessment officers they are payable out of decedent's estate and are proper deductions. *Matter of Hoffman*, 42 Misc. 92, citing *Matter of Babcock*, 115 N. Y. 450-456, and subdivision 2 of § 2719 of Code of Civil Procedure.

Deducted as assessed against decedent in Allegany County, although the taxes were not levied. *Matter of Brundage*, 31 App. Div. 348. Taxes payable at time of decedent's death deducted. *Matter of Liss*, 39 Misc. 123.

NEW YORK CITY personal taxes assessed against the testator for the year 1912 allowed as a deduction from the assets of his estate, the testator having died November 7, 1911. *Matter of Henry Dormitzer*, N. Y. Law Journal, February 6, 1913.

Taxes on real estate situated without the state not allowed as a deduction in the absence of evidence showing that such taxes are not a personal liability of decedent. *Matter of Lennox*, N. Y. Law Journal, June 11, 1908.

(9) Non-resident

For discussion vide *Non-resident Estates supra*, page 147.

DEBTS DUE NON-RESIDENT CREDITORS should be pro rated, as well as mortuary expenses, commissions on property without the State and other administration expenses in respect to such property. *Matter of Browne*, 195 N. Y. 522; *Matter of Porter*, 67 Misc. 19, affirmed, 148 App. Div. 896.

In *Matter of Badger*, N. Y. Law Journal, June 8, 1912, held that where the appraiser had not made the deductions in accordance with the rule in the *Porter* case, *supra*, the proper remedy was by appeal, and if appeal had not been taken that surrogate would not modify decree fixing tax as the error was one of law.

DEBTS OF RESIDENT CREDITORS should be deducted from New York assets. *Matter of King*, 172 N. Y. 616; *Matter of Grosvenor*, 193 N. Y. 652. Vide *Pledged Securities*.

"Under the decision in the *Matter of Porter* (67 Misc. 19, aff'd, 148 App. Div. 896) the appraiser should have deducted from the New York assets the debts due to residents of this State and then deducted the foreign debts and administration expenses in the proportion which the New York assets bore to the entire assets of the estate." *Matter of Yerkes*, N. Y. Law Journal, December 5, 1912.

DEED

County clerk or register reports to state comptroller the filing or recording of any deed "which appears to have been made or intended to take effect in possession or enjoyment after the death of the grantor or vendor." Section 239.

"The transfer tax statute does not impose a tax upon a transfer of property which is made for a valuable consideration." *Matter of Heiser*, N. Y. Law Journal, July 19, 1913, opinion quoted *post*, page 804. For discussion of question as to transfer by deed given for a consideration, vide *supra*, page 37.

As to when transfer subject to tax vide cases cited sub *Gift and Trust Deed*.

UNRECORDED deed not delivered by grantor; held, that property subject to tax. *Matter of Sharer*, 36 Misc. 502; *Matter of Jones*, 65 id. 121.

For discussion of subd. 4 of § 220, vide *supra*, page 35.

DEED OF TRUST

Vide *Trust Deed*.

DEFEASIBLE INTERESTS

Vide *Remainders*.

DEFINITIONS

For the definitions of the statute vide § 243, page 30.

DELAY

Vide Interest.

DELINQUENT ESTATES

Two additional appraisers appointed in New York County to whom are referred delinquent estates, under provisions of second sentence of § 229.

As to proceedings under § 235 vide Matter of Pearsall, N. Y. Law Journal, February 2, 1912, and other cases sub District Attorney.

DEPOSITIONS

Commission to take testimony of witnesses not within the state under §§ 887-888 of Code of Civil Procedure may be issued by surrogate provided the proof upon the application shows that surrogate has jurisdiction of the property for transfer tax purposes. Matter of Wallace, 71 App. Div. 284.

DEPOSITS IN BANKS

Vide Bank Deposits; Property held in Trust for or Jointly with Others.

DESCENT AND DISTRIBUTION

The statutory provisions of descent and distribution are contained in Decedent Estate Law, *supra*, page 548.

Vide Schedule D, *supra*, page 94.

DETRACTION

The tax is not a detraction tax and does not violate our treaties with foreign nation *re droit de detraction*. Matter of Strobel, 39 N. Y. Supp. 169, affirmed, per curiam, 5 App. Div. 621.

DEVOLUTION OF TITLE

Vide Schedule A¹, *supra*, page 102.

As to tax on, Matter of Green, 153 N. Y. 223, *supra*, page 216; Matter of Wolfe, 179 N. Y. 599, *supra*, page 297; Matter of Keeney, 194 N. Y. 281, *supra*, page 360; Matter of White, 208 N. Y. 64, *supra*, page 390; Matter of Agnew, N. Y. Law Journal, December 13, 1913, *supra*, page 53. Vide etiam cases cited sub Power of Appointment; Remainders; Trust Deed; Time of Tax.

DISCOUNT

Vide Interest.

DISPUTED CLAIMS

Vide Compromise of Claim; etiam Schedule B³, *supra*, page 131.

DISTRICT ATTORNEY

- | | |
|--|---|
| (1) Former appraisal a bar. | (4) Costs. |
| (2) Necessary allegations. | (5) When tax not a lien. |
| (3) District attorney has not exclusive right. | (6) Decree not modified although district attorney consented. |

(1) Former appraisal a bar

By direction of Comptroller District Attorney of New York, filed his petition for the assessment and collection of tax in an estate where the surrogate had already made an order. Held, that surrogate's order was a complete bar to District Attorney proceedings. Matter of Wolfe, 137 N. Y. 205.

(2) Necessary allegations

In Matter of Catherine McGee, N. Y. Law Journal, May 3, 1912, Surrogate Cohalan held: "This is an application by the district attorney for an order directing Catherine Molloy, a legatee under the will of the decedent, to pay a balance of a tax alleged to be due on her legacy. The petition alleges that the tax assessed upon the estate of decedent was paid in 1898, but that the sum then paid 'apparently represents a payment on account of principal.' It is not alleged that the tax assessment upon the legacy of Catherine Molloy was not paid in full nor is it alleged that any part of the tax assessed upon her legacy still remains unpaid. In the absence of such necessary allegations the court will not make a decree directing payment."

Another application was made by district attorney in this estate and granted. Vide opinion quoted sub Payment of Tax, page 762.

District attorney obtained an order to show cause why administrators should not pay transfer tax previously assessed. On return day it appeared that tax had been assessed without notice to sole heir at law. Surrogate held that the order obtained by District Attorney must be dismissed as the failure to give notice in original proceedings was a fatal defect. Matter of Winters, 21 Misc. 552.

(3) District attorney has not exclusive right

In *Matter of Phebe Pearsall*, N. Y. Law Journal, February 2, 1912, Surrogate Fowler held that although more than eighteen months have elapsed since the death of the decedent, the Surrogate may upon the petition of any interested party designate an appraiser, and the District Attorney has not the exclusive right to commence such proceedings. The surrogate in his opinion said: "This is a motion by the State Comptroller to have the surrogate assess a tax upon the remainder after the life estate of Frances Pearsall Field in the residuary estate of the decedent.

"Under the provisions of decedent's will this residuary estate was to be held in trust for the benefit of Frances Pearsall Field during her life, and upon her death the trustees were directed to divide it among her issue then surviving. The value of this life estate was ascertained by the appraiser who was designated to appraise the estate for the purpose of the transfer tax; but as the statute in existence at the date of decedent's death provided that future or contingent estates should not be taxed until they vested in possession, he did not ascertain the value of the remainder after the life estate of Frances Pearsall Field, and the order entered upon his report did not assess a tax upon this remainder.

"It is alleged in the moving papers that Frances Pearsall Field died on the 21st day of July, 1907, leaving her surviving four children and the child of one of her children who predeceased her. These children, therefore, became entitled to the possession of the remainder on the 21st day of July, 1907, and the tax upon their respective interests accrued upon that date. The attorney for the executor contends that the district attorney and not the State Comptroller is the proper party to commence this proceeding, and he asks that the surrogate pass upon this preliminary objection before going into the merits of the application to assess the tax.

"This is an application to assess a tax and not a motion to compel the payment of a tax. The distinction is material, because while sections 230 and 231 of the Tax Law prescribe how the value of estates shall be ascertained and the tax assessed thereon, section 235 prescribes the method of procedure to be adopted for the purpose of enforcing payment of the tax. Section 230 provides that the surrogate may, upon his own motion or upon the application of any interested person, desig-

nate one of the appraisers appointed by the State Comptroller to appraise the property of decedents whose estates may be subject to the payment of any transfer tax, while section 231 provides that 'from such report of appraisal * * * the surrogate shall forthwith determine the cash value of all estates and the amount of tax to which the same are liable; or the surrogate may so determine the cash value of all such estates and the amount of tax to which they are liable without appointing an appraiser.' There is nothing in these sections which limits the time within which the surrogate may designate an appraiser or assess a tax upon the appraiser's report, or assess such tax upon his own motion without the appointment of an appraiser. The appraiser's report in the estate of Phebe Pearsall having been duly filed in this court, the surrogate could, by virtue of the authority conferred upon him by section 231, of his own motion assess a tax upon the transfer of the remainder interests to the legatees who became entitled to such interests upon the death of the life tenant. If he could make such assessment upon his own motion, there does not appear to be any valid reason why he could not make it upon the motion of any interested party. For the purpose of appraising estates and assessing a tax under the provisions of the Transfer Tax Law, the State Comptroller is made an interested party (sec. 230 of the Tax Law); therefore the surrogate may, upon the motion of the State Comptroller as a party in interest, assess a tax upon the transfer of the remainder interest to the respective legatees under the will of the decedent.

"Section 235 of the Tax Law makes it the duty of the State Comptroller to notify the district attorney of the refusal or neglect of parties liable to taxation to make such payment, provided that eighteen months have elapsed since the accrual of the tax. It further provides that the district attorney shall apply to the surrogate for a citation directed to such parties to show cause why the tax should not be paid. To construe this section to mean that in all estates where the tax had not been paid within eighteen months after the death of the decedent an appraiser could not be appointed by the surrogate upon the motion of an interested party, or the tax assessed by the surrogate upon his own motion, and that the only method that could be pursued to ascertain the value of taxable interests or determine the tax upon said interests is by the State Comptroller notifying the district attorney and the latter applying to the

surrogate for a citation, would necessarily result in limiting the jurisdiction given to the surrogate by sections 230 and 231 to a period of eighteen months after the death of the decedent or the accrual of the tax. But there is nothing in the language of this section to indicate that the Legislature intended any such restriction or limitation. The procedure prescribed by section 235 is essentially one to compel the payment of the tax; but before a decree of the Surrogate's Court can be entered directing payment, or before contempt proceedings can be instituted to compel payment, it must be made to appear to the satisfaction of the surrogate that there is a tax due and that certain persons are liable for its payment. This can only be shown by the order of the surrogate determining the taxable value of the interests of the legatees or beneficiaries and assessing a tax thereon. Therefore, as the entry of an order assessing a tax is a condition precedent to the granting of a decree directing payment of such tax, the method of procedure prescribed by section 235 to compel payment of the tax cannot limit the jurisdiction granted to the surrogate by sections 230 and 231 to appraise the estates of decedents for the purpose of taxation and to assess a tax thereon in accordance with the provisions of the act.

"As the petition submitted by the State Comptroller upon this motion shows that the life tenant died on the 21st day of July, 1907, and that it then became known in whom the remainder after her life estate vested, the surrogate may, upon the motion of the State Comptroller, determine the value of that remainder interest and assess a tax upon the transfer of that interest to the legatees in whom it vested in accordance with the provisions of decedent's will."

(4) Costs

Costs awarded under § 235 belong to District Attorney.

District Attorney who instituted proceedings and who has gone out of office before termination of appraisal should have notice of final order so that claim to costs may be adjusted by surrogate. *Matter of Bolton*, 35 Misc. 688.

COSTS AWARDED AGAINST COMPTROLLER. In *Matter of Julia Brady*, N. Y. Law Journal, February 5, 1913, Surrogate Fowler held: "This is an application by the district attorney to compel payment of the transfer tax, and is directed to the respondent, John J. Herrick, named in the petition with seven other persons as beneficiaries. The answer by said respondent

shows that he was the executor of his father, John Herrick, deceased, and that as such executor he has duly accounted and been discharged. He further shows that he never had any interest, beneficial or otherwise, in the estate of the decedent herein, which estate, under a deed of trust, his father, said John Herrick, had administered as trustee many years before his death. This answer is almost identical with the respondent's testimony given by him on March 2, 1909, when he was called as a witness before the transfer tax appraiser and there examined by the counsel for the State Comptroller, who represents the district attorney in the present proceeding.

"It seems that the present proceeding should not have begun, in the face of the record before the appraiser showing that the respondent had a perfect defense to any proceeding that might be begun to compel him to pay the transfer tax due against the estate of said decedent, Julia Brady, and that inasmuch as the said counsel for the district attorney, who was then the attorney for the State Comptroller, had taken part in the proceedings before the appraiser, he must have been aware that the disposition of this proceeding, to wit, dismissal, was the only one possible. The surrogate has power in his discretion under section 2561 of the Code of Civil Procedure to fix the amount of costs where there has been a contest."

The proceeding was dismissed with costs against the state comptroller.

(5) When tax not a lien

Vide *Matter of Strail*, 195 N. Y. 575, *supra*, page 368.

(6) Decree not modified although district attorney consented

Proceedings under § 235 having been brought, the estate was appraised, and valuation placed upon business by executor was accepted, and order assessing tax was duly entered. Later motion was made to modify decree, which was denied although successor to district attorney consented. *Matter of Wallace*, 28 Misc. 603.

DIVIDENDS

Vide *Apportionment of Property supra*, page 593.

DIVORCED WIFE

Of son not a person enumerated in paragraph 1, § 221a. *Matter of Merritt*, 155 App. Div. 228.

DOMESTIC CORPORATIONS

Since amendment by Laws 1911, chap. 732, in effect July 21, 1911, transfer of stock of domestic corporation is not subject to tax in non-resident estate. For decisions prior to 1911 amendment vide cases cited sub Non-resident.

DOMESTIC RELATIONS LAW

Widow of an adopted son is "a widow of a son" within intentment of subd. 1 of § 221a. Domestic Relations Law, § 114; Matter of Duryea, 128 App. Div. 205.

DOMICILE

Vide Residence. For discussion of law of domicile vide Matter of Majot, 199 N. Y. 29-34.

DOUBLE TAXATION

To be avoided whenever possible. Matter of Palmer, 183 N. Y. 238; Matter of Cooley, 186 N. Y. 220; Matter of Willmer, 75 Misc. 62-65, affirmed, 153 App. Div. 804; Matter of Thayer, 58 Misc. 117-119, affirmed, 193 N. Y. 430.

Discussion of, in Matter of Penfold, 81 Misc. 598. As to non-resident estates vide *supra*, page 135.

DOUBT

Resolved in favor of taxpayer. Matter of Enston, 113 N. Y. 174; Matter of Vassar, 127 N. Y. 1-12; Matter of Stewart, 131 N. Y. 274; Matter of Fayerweather, 143 N. Y. 114-119; Matter of Harbeck, 161 N. Y. 211; Matter of Wolfe, 89 App. Div. 349-351, affirmed, without opinion, 179 N. Y. 599; Matter of Miller, 77 App. Div. 473-479; Matter of Cooley, 186 N. Y. 220; Matter of Bishop, 82 App. Div. 112-116; Matter of Jourdan, 151 App. Div. 8-12, dissenting opinion adopted in 206 N. Y. 653; Matter of Mergentime, 129 App. Div. 367-374, affirmed, on opinion below, 195 N. Y. 572; Matter of Allen, 76 Misc. 88-91; Matter of de Peyster, N. Y. Law Journal, January 21, 1913, affirmed, without opinion, 156 App. Div. 938.

Court will not, however, emasculate statute by too liberal construction. Matter of Bostwick, 160 N. Y. 489-494.

Vide cases cited Legislative Declaration; Retroactive.

DOUBTFUL CLAIMS

Vide Compromise of Claims; etiam Schedule B³, *supra*, page 131.

DOWER

(1) Intention of testator governs.

(2) Cases in which deduction not allowed.

(3) Deduction allowed.

(1) Intention of testator governs

The widow is entitled to deduction for her dower interest unless she accepts a provision in lieu of dower. The question frequently arises as to whether the provisions of the will are meant to be in lieu of dower. As was said in *Roessle v. Roessle*, 81 Misc. 558-561, "the whole question is one of the testator's intention to be gathered from the language he has used. Matter of Gordon, 172 N. Y. 25, 28. Where such intention is plain the case cannot be aided by the attempted application of rules of construction or the citation of decisions made in construing other wills where either the language of the will or other circumstances of the case differed from those in the case at bar."

(2) Cases in which deduction not allowed

Where widow elects to take legacy in lieu of dower she is not entitled to deduction on theory that her legacy is debt of the estate. Matter of De Graaf, 24 Misc. 147-149.

"The appellant (widow of testator) could have refused to accept the legacy given to her in lieu of dower under the will, in which event, whatever the value of the dower might have been, it could not have been taxable under the Transfer Tax Act, since it would not be a transfer by will; but the moment the appellant accepted the provision under the will in lieu of her dower, a tax under and by virtue of the Transfer Tax Act immediately attached upon that performance." Matter of Riemann, 42 Misc. 648-650.

Testator devised a portion of his real property to his widow, and gave a life interest to her in his remaining real property. Held, that she was not entitled to deduction for dower. Matter of Vivanti, 63 Misc. 618, affirmed, 206 N. Y. 656, *supra*, page 387.

IN MATTER OF HENRY I. BARBEY, 114 N. Y. Supp. 725, Surrogate Thomas held, that as the provisions made by the will in favor of the widow were "expressly stated to be in lieu of dower, and the widow having elected to accept them, the estate is not to be diminished, for purposes of taxation, by the value of her dower right."

IN MATTER OF STUYVESANT, 72 Misc. 295, Surrogate Cohalan

said: "It has been uniformly held by the courts of this state that, in the absence of express words declaring that the testamentary provision is made for the widow in lieu of dower, the widow is entitled to both unless there be such an incompatibility between the claim of dower in addition to the testamentary provision and the other arrangements made by the testator for the disposition of his estate as will indicate a manifest intention on the part of the testator that the widow was not to receive both. *Lewis v. Smith*, 9 N. Y. 502; *Adsit v. Adsit*, 2 Johns. Ch. 448; *Horstmann v. Flege*, 172 N. Y. 384. But if the disposition which the testator has made of his estate indicates clearly that he intended the testamentary provision for his widow in lieu of dower she is put to her election. *Savage v. Burnham*, 17 N. Y. 561; *Vernon v. Vernon*, 53 id. 351; *Asche v. Asche*, 113 id. 234; *Matter of Gorden*, 172 id. 28."

IN MATTER OF EDWARD KEYS, N. Y. Law Journal, March 15, 1912, Surrogate Fowler held: "The decedent having devised all his property to a trustee with directions to pay a certain part of the income to the widow, she is not entitled to dower in addition to the other provisions contained in the will for her benefit, and the appraiser therefore erred in deducting the value of her dower from the taxable assets of decedent's estate (*Matter of Stuyvesant*, 72 Misc. 295)."

(3) Deduction allowed

In *Matter of Weiler*, 122 N. Y. Supp. 608, affirmed, without opinion, 139 App. Div. 905, an application was made to vacate order which had assessed tax on decedent's real estate without deducting therefrom the value of the widow's dower. Surrogate Thomas in granting the application said: "The widow's estate of dower in the lands of the decedent was property, which became vested as an inchoate estate upon her marriage and consummate upon the death of her husband, independent of the will, and not by virtue thereof. *Adsit v. Adsit*, 2 Johns. Ch. 448, 7 Am. Dec. 539; *Lewis v. Smith*, 9 N. Y. 502, 61 Am. Dec. 706; *Sandford v. Jackson*, 10 Paige, 266; *Konvalinka v. Schlegel*, 104 N. Y. 125, 9 N. E. 868, 58 Am. Rep. 494; *Gray v. Gray*, 5 App. Div. 132, 39 N. Y. Supp. 57; *Kimbel v. Kimbel*, 14 App. Div. 570, 43 N. Y. Supp. 900. It was, therefore, not subject to transfer tax, and in assuming it to be so both parties were in error when the order fixing tax was made."

The will contained no direction that the provision therein

in favor of the widow should be in lieu of dower. It provided that all the personal estate should go to the widow for life, and that all the real estate should be held by trustees for the benefit of persons other than the widow. The comptroller contended that the trust in the lands required the widow to elect whether she would take the legacy or her dower, and inasmuch as she had not made an election, there should be no deduction for dower. Surrogate Ketcham discusses and sums up the cases re dower by saying that "only a manifest purpose in the will which would fail if dower were demanded will lead to a construction which requires an election." Held, that in the will at bar there was nothing to indicate that the testator did not intend that his widow should have her dower in the real estate, and that the value of the wife's dower "should be deducted from the gross value of the lands." *Matter of Shields*, 68 Misc. 264.

IN *MATTER OF CHURCH*, 80 Misc. 447, it was held that the appraiser was correct in deducting the value of dower. Surrogate Downs, Orleans County, said: "The comptroller has appealed from such order upon the ground that the assessment of said tax was erroneous, in that the appraiser in determining and fixing the amount thereof has deducted therefrom the value of the widow's dower in all of the real property of which her husband was seized at the time of his death.

"No question is raised upon this appeal as to the rule well recognized that dower does not pass by the will, and is therefore not subject to transfer tax. This principle is clearly enunciated in *Adsit v. Adsit*, 2 Johns. Ch. 448, 7 Am. Dec. 539; *Lewis v. Smith*, 9 N. Y. 502, 61 Am. Dec. 706; *Tobias v. Ketchum*, 32 N. Y. 319; *Vernon v. Vernon*, 53 N. Y. 351. The appellant contends, however, that in this particular case the terms of the will are inconsistent with a claim of dower, and that the widow must either take under the will or elect to take dower.

"The courts of this state in a long line of decisions hold that the right of a widow to dower in her husband's lands is absolute, and that no provision in a will for the benefit of the widow will be deemed to be taken in lieu of dower, unless there be an express declaration to that effect, or unless upon the face of the will there be a clear manifestation of the intent of the testator that the widow shall not take both. *Kimbel v. Kimbel*, 14 App. Div. 570; *Purdy v. Purdy*, 18 App. Div. 310; *Konvalinka v. Schlegel*, 104 N. Y. 125. The will of Perry Church, so far as material in this proceeding, is as follows: 'Second, I give, devise

and bequeath to Margaret Armour, of the town of Ridgeway, Orleans county, N. Y., the Ridgeway farm consisting of about forty-four acres in the town of Ridgeway, Orleans county, N. Y., and now occupied by said Margaret Armour, and also a farm north of Ridgeway Corners in the town of Ridgeway, Orleans county, N. Y., consisting of about sixty-two acres and known as the Hunt place; the said two places being hereby devised to said Margaret Armour in fee simple absolute.

“‘Third, I give, devise and bequeath to my wife Rosetta Church, all the rest, residue and remainder of my property, both real and personal, of whatever kind, name or nature, and wherever situate, and not hereinabove devised, in fee simple absolute forever.’

“There being no express declaration that the provision for the widow shall be in lieu of dower, the only question which presents itself is whether or not the above provisions are inconsistent with a claim of dower, and whether or not the general scheme of the will is defeated if the widow be allowed to take her provision both under the will and dower. In *Konvalinka v. Schlegel*, *supra*, the court says:

“The intention of the testator to put the widow to an election cannot be inferred from the extent of the provision, or because she is a devisee under the will for life or in fee. * * * The only sufficient and adequate demonstration which, in the absence of express words, will put the widow to her election, is a clear incompatibility, arising on the face of the will, between a claim of dower and a claim to the benefit given by the will.

“Appellant claims that the intent of the testator that his widow shall not claim both the provision and dower is shown by the use of the words ‘fee simple absolute.’ I am unable to see the force of any such contention. I believe the testator, in using the above words, intended to convey all of the estate which he had in the property so devised, and that the words are used merely as descriptive of the tenure of the estate. Section 31 of the Real Property Law defines a fee simple absolute as an estate of inheritance not defeasible or conditional. As used in this will, the effect is to convey the whole of the estate which the testator had in the lands conveyed.

“It cannot be claimed that the same words could not have been used had there been a mortgage upon the two parcels of land devised in the second paragraph or any other incumbrance. The dower right is a lien and the wife is entitled to its benefits.

The dower right was not the testator's to give any more than any other incumbrance. *Closs v. Eldert*, 30 App. Div. 338.

"Inasmuch as the terms of this will are consistent with a claim of dower by the widow, the appraiser did not err in deducting the value of such dower in fixing the tax to be assessed."

IN MATTER OF GUSTAV AMSINCK, N. Y. Law Journal, April 19, 1913, the Comptroller appealed from the order fixing tax, which allowed deductions from the decedent's real estate of the dower interest of his widow. Surrogate Fowler held: "The decedent at the time of his death had an estate which is appraised by the transfer tax appraiser in his report as being valued at \$2,774,811.79, the real estate in the State of New York therein mentioned being valued at \$645,000. Under the terms of decedent's will he devised to his widow all of his real estate in the State of New York, and other interests in said estate which are valued at \$1,591,597, making in all the amount of which his widow was the beneficiary the sum of \$2,236,597, which was upwards of 80 per cent. of his entire estate situated in this State. He devised a piece of real estate in Hamburg, Germany, to his sister, and to one whom he describes in his will as his faithful servant, Emma Reidy, he gave the sum of \$10,000 and a lot of land situated in Summit, Union County, N. J., containing about two and one-half acres of land, with the greenhouses thereon and the contents therein. He also gave to Maria Anna Van Duhn and her husband during their joint lives and the life of their survivor the use of the cottage and the grounds adjoining such cottage which they occupied on the decedent's property at Summit, N. J.

"The widow of the decedent did not exercise any power of election in accordance with section 201 of the Real Property Law, and now contends that she is entitled, together with the fee of the real estate in the State of New York specifically devised to her, to a dower interest therein, inasmuch as there was no provision in the will of the decedent to the effect that the provision for her was made in lieu of dower. It seems to me that she is right in her contention.

"Dower is favored by the law and it is never excluded by a provision for the wife except by express words or by necessary implication. Where there are no express words there must be upon the face of the will a demonstration of the testator that the widow shall not take both dower and the provision, and the only sufficient and adequate demonstration which, in the

absence of express words, will put the widow to her election is a clear incompatibility arising on the face of the will between a claim of dower and a claim to the benefit given by the will (*Konvalinka v. Schlegel*, 104 N. Y. 129; *Tobias v. Ketchum*, 32 N. Y. 325, 326; *Horstmann v. Flege*, 172 N. Y. 384). The respective devises made to the widow and the other persons mentioned, considered alone or in connection with the largeness of the gifts made for her benefit, are no evidence of such incompatibility and are insufficient to put her to an election or to deprive her of dower in the lands devised to her (*Carey v. McGowan*, 50 Misc. 426; *Closs v. Eldert*, 30 App. Div. 338, 339, 340; *Matter of Accounting of Frazer*, 92 N. Y. 239; *Konvalinka v. Schlegel*, 104 N. Y. 129). The order entered on the report of the appraiser is sustained."

EDUCATIONAL CORPORATION

Exempt under first sentence of § 221. Since amendment by Laws 1911, chap. 732, *supra*, page 41, an educational corporation, wherever incorporated, is exempt. A transfer to a foreign corporation made prior to 1911 amendment was held not entitled to exemption. *Matter of Balleis*, 144 N. Y. 132; *Matter of Wolfe*, 23 Misc. 439.

For discussion of exemptions vide *Matter of Francis*, 121 App. Div. 129, affirmed, on opinion below, 189 N. Y. 554; *Matter of Mergentime*, 129 App. Div. 367, affirmed, on opinion below, 195 N. Y. 572; *Matter of Moses*, 138 App. Div. 525; *Matter of Arnot*, 145 App. Div. 708, affirmed, without opinion, 203 N. Y. 627; *Matter of Field*, 71 Misc. 396, affirmed, without opinion, 147 App. Div. 927; *Matter of Allen*, 76 Misc. 88; *Matter of McCormick*, 206 N. Y. 100.

Testator bequeathed the residue of his estate to the city of Yonkers, in trust, to found and maintain a trades school *under the direction of the board of education and as a part of the public school system* for the teaching of mechanical trades and practical and scientific knowledge connected therewith, to such persons as wish to learn a trade by which to earn their living particularly. *Held*, that the transfer was not taxable. *Matter of Saunders*, 77 Misc. 54-57, affirmed, without opinion, 156 App. Div. 891.

NEW YORK HISTORICAL SOCIETY was held to be an educational corporation and entitled to the exemptions under the first sentence of § 221, Surrogate Cohalan in his opinion, *Matter of de Peyster*, N. Y. Law Journal, January 21, 1913, affirmed,

without opinion, 156 App. Div. 938, saying: "The Court of Appeals has said that a transfer tax is not a general burden imposed upon the citizens of the State, and that in a proceeding to assess such a tax the provisions of the statute should be construed in favor of the citizen (*Matter of Enston*, 113 N. Y. 174; *Matter of Fayerweather*, 143 N. Y. 114). A corporation which gives free education to the people of the State is a beneficent agent of government. It performs a meritorious governmental service; it aids the government in what is perhaps the most important of governmental functions—the making of good citizens. That the New York Historical Society is such a corporation is obvious from the above recital of its possibilities for public usefulness. By means of its free lectures it diffuses knowledge upon various subjects; by means of its manuscripts, prints and pictures it gives the student an opportunity of accurately grasping the details of historic occurrences and events. Its wealth of historical data is available to the historian, the sociologist and the statesman. Its records showing the sacrifices that have been made for country and for principle inspire patriotism in the young and altruism in the aged."

YOUNG MEN'S SYMPHONY ORCHESTRA and People's Symphony Concerts were declared to be educational corporations, within the meaning of the first sentence of § 221, in *Matter of Alfred L. Seligman*, N. Y. Law Journal, July 19, 1913. Surrogate Fowler in dismissing the appeal of the state comptroller said: "An examination of the proofs upon which the findings of the exemption of these two corporations were based shows that the object of incorporation of the People's Symphony Orchestra was 'to provide musical entertainment and instruction to the public and to encourage and develop the taste and study for music.' The affidavit by the president of the society shows that it lives up to the purposes of its incorporation; that at all concerts by it each number on the programme is preceded by a lecture delivered by the musical director, and that it generally consists of a sketch of the life of the composer whose work is to follow, a statement of the idea he wishes to convey, and an analysis of the method used in the elaboration of the musical theme. It is also shown that the lecturers under the Board of Education of the City of New York have recognized the educational value of these concerts, and have made requests for information regarding them, so that announcements might be given to pupils and audiences attending their lectures. It is

further shown that the society depended upon gifts for two-thirds of its income, and by its treasurer's report for a number of years up to the season of 1911-1912 it is shown that a deficit averaging about \$2,500 a year was made up by contributions.

"The proofs annexed to the report and referring to the Young Men's Symphony Orchestra of New York show that this corporation was formed to promote musical efficiency among its members and to train them in orchestral and ensemble playing, and to lay the foundation so that they might attain a high professional plane as musicians. The affidavit of its vice-president and secretary shows that it is entirely supported by gifts and voluntary contributions, and that all its officers, members and employees render their services gratuitously, nor do any of them receive any pecuniary profit, except the musical director, who receives a reasonable compensation for his services. Under the decision in the Matter of De Peyster (N. Y. Law Journal, January 21, 1913), wherein an appeal had been taken by the New York Historical Society from an order assessing a transfer tax upon a bequest by the decedent to it, it was found 'that it affords the public at large an opportunity of viewing fine paintings, perusing rare books, examining historical treasures, inspecting manuscripts connected with the history of this State, * * * and that in addition to these it performs the affirmative or active work of diffusing knowledge or information through the system of lectures inaugurated by it and held at frequent intervals during the year. It cannot be said to be exclusively historical when we take into consideration the opportunities afforded to the public for instruction, for the acquisition of knowledge and cultivation of the intellectual.' * * *

"Young Men's Symphony Orchestra of New York and the People's Symphony Concerts are engaged in work which is purely educational and closely analogous to that which it appears from the quotation from the decision cited is carried on by the New York Historical Society, and like that society the work of the corporations under examination might be said to be embraced within the meaning of the word 'educational,' as used in the Tax Law to designate corporations entitled to exemption from taxation. There was no evidence before the appraiser that would justify a finding other than that made by him as to the taxable value of the specific legacies to the Young Men's Symphony Orchestra."

ELECTION

- | | |
|---|-----------------------------|
| (1) Renunciation of legacy. | (4) Renunciation of commis- |
| (2) Assignment of legacy. | sions. |
| (3) Election by appointee of
power of appointment. | (5) Non-resident estates. |

(1) Renunciation of legacy

May elect not to take under will and thus avoid tax. *Matter of Wolfe*, 89 App. Div. 349, affirmed, without opinion, 179 N. Y. 599; *Matter of Mather*, 90 App. Div. 382-385, affirmed, without opinion, 179 N. Y. 526.

QUERY as to whether can renounce transfer operating under the laws of inheritance or descent. *Matter of Wolfe*, 89 App. Div. 349-354, *supra*, page 299.

Legatee may renounce a part of a legacy. *Matter of Merritt*, 155 App. Div. 228.

(2) Assignment of legacy

Where there has been an assignment of a legacy the tax is the same as though the assignment had not been made. *Matter of Cook*, 187 N. Y. 253.

(3) Election by appointee of power of appointment

For cases where appointee of power has taken under the original will and not by virtue of the exercise of the power of appointment vide *Matter of Lansing*, 182 N. Y. 238; *Matter of Ripley*, 122 App. Div. 419, affirmed, *per curiam*, 192 N. Y. 536; *People ex rel. Ripley*, 69 Misc. 402; *Matter of Haggerty*, 128 App. Div. 479, affirmed, without opinion, 194 N. Y. 550; *Matter of Lewis*, 60 Misc. 643, reversed on authority of *Matter of Lansing* and *Matter of Haggerty*, *supra*, 129 App. Div. 905, the Appellate Division being affirmed, without opinion, 194 N. Y. 550; *Matter of Haight*, 152 App. Div. 228. Vide etiam *Matter of Backhouse*, 185 N. Y. 544, *supra*, page 328.

It has been held that the position taken by the appointee in the transfer tax proceeding is sufficient election. *Matter of Chapman*, 133 App. Div. 337-340, appeal dismissed, 196 N. Y. 561, same case in 138 App. Div. 923, the order of surrogate being affirmed on authority of 133 App. Div. 337, *supra*, affirmed, without opinion, 199 N. Y. 562. It is the practice, however, for the appointee to file with the appraiser a formal statement, duly acknowledged, setting forth his election. This is the better practice for it makes the record complete. Vide *MATTER OF*

MITCHILL, N. Y. Law Journal, November 22, 1913, *post*, page 777.

Where the exercise of the power works a modification to the extent of creating different estates and interests, Surrogate Heaton of Rensselaer County, in *Matter of Warren*, 62 Misc. 444-448, held that the beneficiaries under the power being compelled "to take, if at all, under the power, they cannot elect to take upon the original will for the purposes of this application."

(4) Renunciation of commissions

In *Matter of Stephen Van Rensselaer*, a non-resident, N. Y. Law Journal, October 11, 1912, Surrogate Fowler said: "No proof of the law of New Jersey in regard to the particular time at which executors become entitled to commissions was adduced before the appraiser. In the absence of such proof it will be presumed that the law of New Jersey on this question is the same as our law (*Hynes v. McDermot*, 82 N. Y. 41; *Savage v. O'Neill*, 44 N. Y. 298). Our courts hold that an executor is not entitled to commissions until such commissions have been ascertained by the court and a decree entered authorizing their payment (*Wheelright v. Rhodes*, 28 Hun, 57; *Freedman v. Freedman*, 4 Redf. 211). If, therefore, the executor of the decedent's estate renounced his right to commissions before a decree of the Orphans' Court of New Jersey was made determining the amount of such commissions and directing their payment, he renounced something to which he was not actually entitled and to which he never became entitled. The estate was not diminished by the amount of such commissions, because they were never deducted from the estate and had never become the lawful property of any individual. The property passed without any deduction for commissions to the legatee mentioned in decedent's will and upon the privilege of succeeding to the entire amount of the property so transferred a tax may be imposed.

"If, however, the renunciation was made after the entry of the decree in the Orphans' Court ascertaining such commissions and directing their payment, then, as such commissions would be the property of the executor, his renunciation of them would constitute a gift of the amount of such commissions from him to the legatee and they would not form a part of the taxable assets of the estate.

"As the report of the appraiser does not contain a copy of the decree of the Orphans' Court nor a copy of the renunciation of the executor, it is impossible to determine at this time whether the commissions alleged to have been renounced by the executor constituted a part of the estate that passed to the legatee under the will of the decedent or whether they passed to the legatee as a gift from the executor. Such a determination will be made in the manner herein indicated when copies of the documents above mentioned have been filed with the papers upon this appeal."

As to allowance of commissions in resident estate vide page 126; in non-resident estate, page 149.

(5) Non-resident estate

Chap. 310, Laws 1908, in effect May 18, 1908, added to § 220 the present subdivision 3, which reads: "Whenever the property of a resident decedent, or the property of a non-resident decedent within this state, transferred by will is not specifically bequeathed or devised, such property shall, for the purposes of this article, be deemed to be transferred proportionately to and divided *pro rata* among all the general legatees and devisees named in said decedent's will, including all transferees under a residuary clause of such will."

Prior to 1908 amendment the executor could so marshal the assets as to avoid or minimize the tax. Matter of James, 144 N. Y. 6; Matter of Whiting, 200 N. Y. 520; Matter of McEwan, 51 Misc. 455. Not possible in intestacy. Matter of Ramsdill, 190 N. Y. 492.

For discussion of amendment vide *supra*, page 152.

Constitutionality of 1908 amendment upheld. Matter of Porter, 67 Misc. 19, affirmed, without opinion, 148 App. Div. 896.

ENFORCEMENT LAWS CONCERNING CHILDREN OR ANIMALS

Corporations organized for the enforcement of laws relating to children or animals, wherever incorporated, are exempt under the provisions of the first sentence of § 221.

Prior to amendment of § 221 by chap. 206, Laws 1912, in effect April 8, 1912, a bequest of money to the society held taxable. Surrogate Cohalan in his opinion in Matter of Daly, 79 Misc. 586, an estate in which decedent died prior to the 1912

amendment, said: "While fully appreciating the valuable services which the society renders and the admirable work which it performs, I am constrained to hold that it is not an educational, charitable or benevolent corporation within the meaning of those terms in section 221 of the transfer tax statute. The remedy for the statutory discrimination against corporations similar to the Society for the Prevention of Cruelty to Animals lies with the Legislature and not with courts. In *Matter of Moses*, 138 App. Div. 525, the court held that the Brooklyn Society for the Prevention of Cruelty to Children was not entitled to exemption from taxation on a bequest of money or securities. This decision I consider controlling upon the matter under consideration." To same effect *Matter of Saunders*, 77 Misc. 54-63, affirmed, without opinion, 156 App. Div. 891.

EQUITABLE CONVERSION

ACTUAL FORM in which property existed at time of death determines liability to tax, and the doctrine of equitable conversion is not applicable. *Matter of Swift*, 137 N. Y. 77-86; *Matter of Sutton*, 149 N. Y. 618; *Matter of Dows*, 167 N. Y. 227-232, sustained in 183 U. S. 278, sub nom. *Orr v. Gilman*.

In *Matter of Baker*, 67 Misc. 360, decedent was under contract to sell real estate in another state, and left a conveyance thereof which was delivered the day after her death. Held, that the rule was that "however the equitable conversion may have been effected, by will or contract, the property is to be taxed or exempted according to its nature and tenure at the decedent's death," and therefore the transfer in question was not taxable as the land was without the state of New York.

Where testator directs that his real estate be sold and that a portion of the proceeds be given to his daughter, and the daughter dies before the real estate is sold, the interest passing under daughter's will is taxable as personal property. *Matter of Mills*, 177 N. Y. 562.

EQUITY

EQUITY and exact justice not the concern of the courts in applying the statute, as the proceeding is statutory and not one in equity. *Matter of Tracy*, 179 N. Y. 501-509; *Matter of White*, 208 N. Y. 64-68.

"Laws relating to taxation cannot of necessity enter into the minute equities of each individual case." *Matter of Borup*, 28 Misc. 474.

"As the imposition of a transfer tax is a statutory and not an equitable proceeding this court cannot depart from the procedure prescribed by the transfer tax statute in order that equity may be done between the state of New York and the beneficiaries of decedent's bounty." *Matter of Stuart*, N. Y. Law Journal, May 10, 1913.

Foreign inheritance tax not allowed as a deduction, although, as was said by Surrogate Fowler in *Matter of Penfold*, 142 N. Y. Supp. 678-769: "I confess that it seems to me hard in principle that an abstraction, and not property, should be made the subject of taxation. To exact a tax in the last resort on property which has already been appropriated by a co-ordinate taxing power seems to me indefensible in principle; but if such is the law, and I think it is, it must be followed by me, regardless of my own theories or convictions."

ERRONEOUS PAYMENT OF TAX

People ex rel. Ripley v. Williams, 69 Misc. 402; *Matter of Scott*, 208 N. Y. 602, *supra*, page 396; and cases cited sub *Payment of Tax*; *Refund*; *Vacating Decree*.

EVASION OF TAX

Vide *Reappraisal*.

"Efforts to evade the law are secret and not public. Witnesses are not called in to attest them. The evidence to prove the same must of necessity be circumstantial rather than direct and such circumstantial evidence may overbear the positive testimony of an interested party who swears to the contrary. The effect of this transfer is to pass the property to the next of kin of the deceased exactly as it would have passed by will had this transfer not been before made. There is no moral reason why this property should not be taxed as though the property had passed three months later by the will of the deceased. Courts should not be over zealous to protect an estate from taxation and to shield parties by a presumption of innocence where no other rational motive for a transfer is shown, and no reason appears why the estate itself should not bear its just proportion of the public burden." *Matter of Palmer*, 117 App. Div. 360-368; *Matter of Jones*, 65 Misc. 121-123.

"If a transfer of property is made for the purpose of cheating the law and avoiding payment of the transfer tax, it may well be that a gift so made although absolute and unconditional, is

made in contemplation of death, and that a tax should be paid thereon although the grantor, vendor or donor may live for many years thereafter." *Matter of Cornell*, 66 App. Div. 162-169, modified, but not as to this dicta, in 170 N. Y. 423. Vide cases cited sub Contemplation of Death.

Attempt to evade tax by refusal to answer material questions punishable in contempt proceedings before surrogate. *Matter of David Kennedy*, 113 App. Div. 4-8.

Act done to evade tax would make case not within previous decisions. *Matter of Cooley*, 186 N. Y. 220-229.

In *Matter of Sarah Heiser*, N. Y. Law Journal, July 19, 1913, opinion quoted page 804, Surrogate Fowler held that it was immaterial for what purpose a joint tenancy was created in the absence of an allegation of fraud.

Even though payment of tax may be evaded it should be assessed. *Matter of Dingman*, 66 App. Div. 228.

EVIDENCE

Vide Burden of Proof; Laws of Another State; Testimony.

EXAMINER OF VALUES

Examiner of values in New York County. Section 229. Vide page 113.

EXCEPTIONS AND LIMITATIONS

§ 221, *supra*, page 5 and page 40.

Vide Exemptions, *post*, page 685.

EXCLUSIVE JURISDICTION

Vide Code of Civil Procedure, §§ 2476-2477 and § 228 of Tax Law. As to resident estates vide *supra*, page 56. For non-resident estates vide *Matter of Hathaway*, 27 Misc. 474, and discussion, *supra*, page 137.

EXCUSE FOR NON-PAYMENT

Vide Interest.

EXECUTOR

Commissions of, discussed sub Schedule B², *supra*, page 126.

As to production of receipt upon final accounting, vide *Matter of Meyer*, 209 N. Y. 386, *supra*, page 397.

Vide Appeal; Contempt; Lien of Tax; Payment of Tax.

EXEMPLIFIED COPIES

Vide Laws of Another State or County.

EXEMPTIONS

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|---|---|
| (1) Exemptions under § 221. | (5) Foreign corporations prior to 1911 amendment. |
| (2) Status of corporation claiming exemption. | (6) Legislature may release from tax. |
| (3) Form for affidavit claiming exemption. | (7) Amount of exemption and rate of tax. |
| (4) Corporations to be formed after testator's death. | |

Vide Adopted Child; Bishop; Burden of Proof; Cemetery Plot; Charitable; Deductions; Educational; Enforcement Laws Concerning Children or Animals; Illegitimate Descendants; Library; Municipality; Mutually Acknowledged Relation; Religious; Wife.

The present statutory provisions relative to exemptions are contained in §§ 221, 221a and 221b, and are discussed, *supra*, page 40.

Application to have estate declared exempt discussed, *supra*, page 83.

(1) Exemptions under § 221

The historical development of the statute relative to exemptions now grouped under § 221 may best be studied by the examination of the following cases:

LAWS 1887, CHAP. 713: *Catlin v. Trustees of Trinity College*, 113 N. Y. 113, *supra*, page 164; *Matter of Van Kleeck*, 121 id. 701; *Matter of Prime*, 136 id. 347-355; *Matter of Hamilton*, 148 id. 310.

LAWS 1892, CHAP. 169: *Church of the Transfiguration v. Niles*, 86 Hun, 221.

LAWS 1892, CHAP. 399: *Matter of Balleis*, 144 N. Y. 132; *Matter of Palmer*, 33 App. Div. 307, affirmed, on opinion below, 158 N. Y. 669; *Matter of Wolfe*, 23 Misc. 439.

LAWS 1896, CHAP. 908: *Matter of Thrall*, 157 N. Y. 46; *Matter of Graves*, 171 id. 40; *Matter of Kimberly*, 27 App. Div. 470.

LAWS 1900, CHAP. 382: *Matter of Huntington*, 168 N. Y. 399; *Matter of Watson*, 171 id. 256; *Matter of Crouse*, 34 Misc. 670.

LAWS 1901, CHAP. 458: Matter of Prall, 78 App. Div. 301; Matter of Kucielski, 144 id. 100.

LAWS 1903, CHAP. 41: Matter of Eliza White, 118 App. Div. 869.

LAWS 1905, CHAP. 368: Matter of Francis, 189 N. Y. 554; Matter of Mergentime, 195 id. 572; Matter of McCormick, 206 id. 100-104; Matter of Moses, 138 App. Div. 525; Matter of Higgins, 55 Misc. 175-178.

LAWS 1908, CHAP. 310; Matter of Townsend, 153 App. Div. 85.

LAWS 1909, CHAP. 62: Matter of Arnot, 145 App. Div. 708, affirmed, without opinion, 203 N. Y. 627; Matter of Robinson, 80 Misc. 458.

LAWS 1911, CHAP. 732: Matter of Neustadter, N. Y. Law Journal, August 16, 1913, opinion quoted page 688.

(2) Status of corporation claiming exemption

The status of a corporation claiming exemption under § 221 "must be determined by the statutory law and its certificate of incorporation rather than by what it has assumed to do thereunder." Matter of Eliza White, 118 App. Div. 869-871; Matter of Moses, 138 App. Div. 525-532; Matter of Field, 71 Misc. 396, affirmed 147 App. Div. 927; Matter of Robinson, 80 Misc. 458-465.

Cooper Union by its charter is exempted from taxation, but notwithstanding that fact a legacy to it by one not its founder who died in 1901 is subject to transfer tax. Matter of Kucielski, 144 App. Div. 100.

UNITED STATES government not exempt. Matter of Merriam, 141 N. Y. 479, sustained in 163 U. S. 625, sub nom. United States v. Perkins; Matter of Cullum, 145 N. Y. 593.

MASONIC HALL and Asylum Fund was held to be within the exemptions under § 221 in Matter of Allen, 76 Misc. 88 (1912). The state comptroller contended "that, inasmuch as the education and the charity dispensed by this corporation are limited to a particular class, *i. e.*, members of a fraternal organization and their wives, widows and orphans, its charity or benevolence is not of a general or public nature, as its benefits are not open to aged and indigent men, their wives, widows and orphans as constituting a general class of humanity, and that the appellant being a private charitable or benevolent corporation is not within the meaning or intent of the exceptions and

limitations contained in section 221 of the Tax Law in relation to taxable transfers."

City of Philadelphia v. Masonic Home, 160 Penn. St. 572, 28 Atl. Rep. 954, was cited in support of this contention. Surrogate Fraser, Washington County, in overruling the contention said: "The statute does not provide that the exemption shall be to a *public* educational, charitable or benevolent corporation, but to *any* educational, charitable or benevolent corporation and surely it cannot be successfully contended that the corporation, the Trustees of the Masonic Hall and Asylum Fund, is not an educational and charitable corporation."

(3) Form for affidavit claiming exemption

The claim for exemption under § 221 should be made by affidavit to be filed with the appraiser.

The following is a good illustration of the form the affidavit should take:

SURROGATES' COURT, NEW YORK COUNTY.

In the Matter of the Appraisal,
under the Act in Relation to
Taxable Transfers of Property,
of the Property of
CORNELIA EATON,
Deceased.

Affidavit for Exemption Under
§ 221.

State of New York, }
County of New York, } ss:

ROBERT W. DE FOREST being duly sworn, says: That he is the Vice President of the Presbyterian Hospital in the City of New York and that said corporation is a domestic corporation organized by charter of the State of New York.

That said corporation was incorporated and is maintained exclusively for hospital purposes, and is a Hospital corporation within the meaning of Section 221 of Chapter 62 of the Laws of 1909, and all other acts amendatory and supplemental thereto. That the object of said corporation is, as set forth in its charter, to wit:

"The object of the Society is the establishment,
"support and management of an institution for
"the purpose of affording surgical and medical
"aid and nursing to sick and disabled persons
"of every creed, nationality and color."

That the said corporation is not a stock corporation, nor profit-making enterprise of any description.

That no officer, member or employee receives or is entitled to receive any pecuniary profit from the operations of the said corporation, except reasonable compensation for services in effecting one or more of the purposes for which said corporation was organized.

WHEREFORE the deponent asks that the said corporation may be declared exempt from the payment of the transfer tax on the legacy to it under the last Will and Testament of Cornelia Eaton, deceased.

ROBERT W. DE FOREST.

Sworn to before me this

14th day of October, 1912.

WILLIAM MCBRIEN,

Notary Public, Queens County,

Certificate filed in New York Co. (No. 24).

It is true that the courts have allowed an exemption under § 221 even though it has not been claimed at the time of appraisal. The practitioner should not, however, depend upon the court allowing the exemption but should make his claim in due season.

(4) Corporation to be formed after testator's death

Bequests and devises to a corporation to be formed to be known as Arnot Art Gallery were held exempt. *Matter of Arnot*, 145 App. Div. 708, affirmed, without opinion, 203 N. Y. 627. The testator died February 15, 1910, and the Arnot Art Gallery was incorporated in March, 1911.

Under Laws 1896, chap. 908, a bequest to trustees "for the purpose of founding, erecting and maintaining" a proposed Home for the Aged was held not subject to tax. *Matter of Graves*, 171 N. Y. 40. Vide *Matter of McCartin*, N. Y. Law Journal, December 5, 1913, opinion quoted *supra*, page 608.

CORPORATION NOT FORMED AT TIME OF APPRAISAL. In *Matter of Caroline Neustadter*, N. Y. Law Journal, August 16, 1913, Surrogate Cohalan held: "The decedent died on the 19th day of January, 1912, a resident of New York County. An appraiser was duly appointed to appraise her estate for the purpose of the transfer tax, and from the order entered upon his report this appeal is taken. In paragraph twenty-fourth of her will she gives to trustees therein named the sum of \$1,000,000, and directs them to organize a corporation to be known as 'The Neustadter Homes,' the corporation to be formed within two years after her decease, 'provided Marjorie Walker, George Sternberger or the survivor of them shall live so long.' She further directed that the corporation should erect 'model

homes' for persons of moderate means, and that it should charge such rental for the homes as would show a net return of six per cent. upon the investment. This net income may be used in the discretion of the trustees for the purpose of erecting new buildings or improving and altering the existing ones.

"It is contended by the executors that this bequest is exempt from taxation as being for a charitable purpose. A net return of six per cent. upon capital invested in real estate holdings would ordinarily be regarded as good business, and the persons who occupied homes erected by such a corporation and paid such rentals as would insure a net income of six per cent. upon the capital invested would certainly resent the insinuation that they were objects of charity. Under modern conditions it is sometimes difficult to determine accurately where philanthropy begins and where business ends, but I doubt if we have yet reached the stage of philanthropic development when a net return of six per cent. on capital invested in real estate can properly be characterized as an investment for charitable purposes. I am inclined to think that the Legislature intended to limit the meaning of the word 'charitable' as used in the Transfer Tax Act to those corporations which aid the poor and needy by gifts, donations or other financial assistance from which a pecuniary dividend is neither expected nor required. The will further provides that the corporation must be organized within the lifetime of Marjorie Walker and George Sternberger, or the survivor of them. These persons are not identified in the will, and there is nothing in the appraiser's report to show whether they are still alive. If they are not living the corporation cannot be organized. In that case the bequest would lapse and become a part of the residuary estate, and taxable at the rate prescribed for beneficiaries of the one per cent. class. In a codicil to the will the testatrix directs that if it should be held that this bequest is subject to a transfer tax, then that provision of the will is revoked, and she directs the trustees to form 'a charitable corporation to be known and designated as the Neustadter Home.'

"This corporation has not yet been organized, and until satisfactory proof has been made to the court that the proposed corporation shall be charitable within the meaning of that word in section 221 of the Tax Law, and that it was organized within the time limited by the will and codicil, it will not be declared exempt from taxation."

BEQUEST TO TRUSTEES FOR CHARITABLE AND BENEVOLENT PURPOSES was discussed by Surrogate Sawyer, Westchester County, in Matter of Robinson, 80 Misc. 458 (1913). The state comptroller contended that the bequest was not exempt under § 221 because it was not to a corporation, his brief stating: "There is no doubt that the purposes provided for by the testatrix were charitable and benevolent. Nor can there be any doubt that the transfer of her residuary estate was to these two trustees and not to a corporation."

The estate claimed the transfer was exempt under § 221 because the bequest was left in trust for charitable purposes and provision was made that the execution of such charitable purposes *may be carried out by a corporation*, if the trustees think it advisable.

The surrogate held that the transfer was taxable and in the course of his opinion said:

"The question in this case then is simply this: Is a bequest to two trustees, in trust, for charitable purposes, with a discretionary right given to the two trustees to form a corporation, if they deem it advisable, to carry out the trusts provided for in the will of the testatrix, exempt from taxation under the provisions of the first portion of section 221 of the Transfer Tax Law," which is as follows:

"But any property devised or bequeathed to any person who is a bishop or to any religious, educational, charitable, missionary, benevolent, hospital or infirmary corporation, including corporations organized exclusively for Bible or tract purposes, shall be exempted from and not subject to the provisions of this article."

"There is no mandatory direction by the testatrix to the trustees to form any corporation. They may do so if they choose, or they may increase the number of trustees; but the right given to form a corporation is simply permissive and not mandatory.

"The testatrix died in 1909, four years ago. No corporation has ever been formed by the trustees, nor have I received any intimation that one will ever be formed. I think that I can safely say that one never will be formed. If the intention of the trustees had been to form a corporation to carry out the purposes as set forth in the will, they certainly would have filed their certificate of incorporation within the four years last past. I am compelled to take the situation as I find it. The title to the

'res' or trust fund is certainly now vested in Burton C. Meighan and Frank B. Upham, in trust, for the purposes as set forth in the will of the testatrix. Section 220 specifically states that the transfer of any property, real or personal, over \$500, is taxable, whether the same is in trust or otherwise.

"By the most strained construction of section 221, I do not see how the framers of the law ever intended that a bequest such as the one under consideration should be exempt under the clause quoted. The devise is clearly not to a corporation. There being no corporation formed, how are we to ascertain the status of the corporation and determine whether or not it is a charitable, religious, or other kind of a corporation. This phase of the situation was considered in the *Matter of White*, reported in 118 App. Div. 869, 103 N. Y. Supp. 688, and the judge writing the opinion stated as follows:

"'The status of this corporation must be determined by the statutory law and its certificate of incorporation rather than by what it has assumed to do thereunder.'

"This is the proper way of determining the status of any corporation claiming exemption under the Transfer Tax Law.

"The above case was cited with approval in *Matter of Moses*, 138 App. Div. 525, 123 N. Y. Supp. 443.

"It is an elementary rule of statutory construction that the words of a statute are to be given the usual ordinary meaning. *McCluskey v. Cromwell*, 11 N. Y. 593; *Matter of O'Neil*, 91 N. Y. 516; *Matter of Daly*, 79 Misc. Rep. 586, 141 N. Y. Supp. 199.

"If the Legislature had intended to pass an act allowing exemptions to trustees for charitable purposes, they certainly would not have divided the section into two different paragraphs, one in which they exempted only devises and bequests to certain corporations and the other of which they exempted where the devise or bequest was to corporations for charitable purposes.

"As the case at bar is a devise to trustees for a charitable purpose, by the most liberal construction, I am compelled to hold that even though there is a permissive right to form a corporation, where some steps have not actually been taken to form such a corporation, this fact in itself will not be sufficient to warrant an exemption under the first paragraph of section 221 of the Tax Law. If the corporation had been already formed when the application was made to this court, the result might

be different. I am not called, however, to pass upon this question at this time. The corporation has never been formed.

"Clearly the framers of this statute never intended any devise to a trustee for charitable purposes to be exempt under section 221. While fully appreciating the charitable intentions of the testatrix, I am of the opinion that the statute shows clearly that a tax must be imposed in this case upon the residuary estate transferred. If the law is severe, then the remedy lies with the Legislature and not with the courts."

Appeal from decision pending.

(5) Foreign corporations prior to 1911 amendment

Foreign corporations are now entitled to exemption, but transfers made prior to 1911 amendment are not exempt. *Matter of Julia A. Smith*, 77 Hun, 134; *Matter of Balleis*, 144 N. Y. 132; *Matter of Prime*, 136 N. Y. 347; *Matter of Wolfe*, 23 Misc. 439.

In *Matter of Charles N. Crittenton*, N. Y. Law Journal, April 5, 1911, Surrogate Cohalan held: "This appeal is taken by the National Florence Crittenton Mission from an order assessing a tax upon the transfer of a bequest made to it by the decedent. The appellant was created by an act of Congress and made a body politic and corporate in the District of Columbia. Its headquarters are in Washington, but it maintains a place in New York City for the exercise of its benevolent and charitable functions. It claims that it is included in the classification of exempt corporations mentioned in section 221 of the Transfer Tax Act. That it is a benevolent and charitable association may be conceded, but to entitle it to exemption from the operation of the provisions of the Transfer Tax Law it must also appear that it is a corporation created by or under the laws of the State of New York and subject to visitation and control by this State (*Matter of Prime*, 136 N. Y. 347; *Matter of Balleis*, 144 N. Y. 132). The appellant contends that it is a domestic corporation within the meaning of the definition in subdivision 18 of section 3343 of the Code. But this definition is explained and limited by article 1, section 3, subdivision 5, of the General Corporation Act, which defines a corporation as 'a corporation incorporated by or under the laws of the State or Colony of New York. Every corporation which is not a domestic corporation is a foreign corporation, except as provided by the Code of Civil Procedure for the purpose of con-

struing such Code.' As this proceeding is not brought under the Code of Civil Procedure, but is an application for exemption from taxation under an entirely independent act, it must be held that the appellant is not a domestic corporation for the purpose of claiming the exemption provided in section 221 of the Transfer Tax Law."

AMERICAN BAPTIST FOREIGN MISSION SOCIETY incorporated in three states, including New York, held to be exempt under § 221. *Matter of Lyon*, 144 App. Div. 104.

(6) Legislature may release from tax

Legislature may release property which had been bequeathed or devised from the provisions of the inheritance tax act, whether such bequest or devise had become operative prior to the passage of the act, or subsequent thereto. *Church of the Transfiguration v. Niles*, 86 Hun, 221-223. Vide cases cited sub Legislative Declaration.

(7) Amount of exemption and rate of tax

The statutory provisions relative to rates of tax and the amount of exemption to the individual beneficiary are now comprised within § 221a. The present statute is discussed, *supra*, page 40. The previous statutes are set forth, *supra*, page 403, and the cases on this branch of the law are arranged chronologically, *post*, page 808.

EXPENSES

Of administration vide Schedule B² *supra*, page 125. Funeral expenses, Schedule B¹ *supra*, page 124.

EXPERT

"In practice if a person who is a resident of this State dies seized of real estate the appraiser does not personally appraise the property, but accepts the evidence of some one qualified to appraise real estate; if the property consists of paintings, statuary or works of art the appraiser requires the evidence of a person whose experience and knowledge of art and the market for art enable him to testify as to the value of such articles; if the property consists of stocks and bonds, their value is ascertained by a reference to the quotations in the standard financial publications, or if necessary, experts may be called." *Matter of Cora F. Barnes*, N. Y. Law Journal, December 17, 1913.

Appraisal of real estate by expert, vide Schedule A¹ *supra*, page 98.

Of personal chattels, vide Schedule A³ *supra*, page 107.

Expert accountant, vide Schedule A⁵ *supra*, page 117.

Stock not customarily bought or sold, vide Closely Held Stock.

As to laws of another state or country, § 942 of Code of Civil Procedure and page 729.

FAIR MARKET VALUE

Vide Cash Value.

FATHER

Entitled to five thousand dollar exemption and the lower rates of subd. 1 of § 221a. Vide pages 45 *et seq.*

FEDERAL INHERITANCE TAX

The taxable assets should not be diminished by first subtracting the tax fixed by the United States Inheritance Tax. Matter of Gihon, 169 N. Y. 443; Matter of Becker, 26 Misc. 633-635; Matter of Irish, 28 id. 647; etiam Matter of Penfold, 81 id. 598.

FEDERAL QUESTIONS

Vide United States Supreme Court, cases *post*, page 877; Appeal, *supra*, page 593.

FINAL ACCOUNTING

Vide second sentence of § 236; etiam Matter of Meyer, 209 N. Y. 386, *supra*, page 397.

FITCHBURG R. R. CO.

Prior to amendment by chap. 732, Laws 1911, in effect July 21, 1911, stock of Fitchburg Railroad Company, of which non-resident decedent died possessed, was taxed on 2551/10000 basis. Matter of Thayer, 193 N. Y. 430.

Since the 1911 amendment to §§ 220 and 243 stock is not taxable in non-resident's estate.

FOREIGN CORPORATIONS

Stock of foreign corporations taxable when held by resident. Matter of Merriam, 141 N. Y. 479-485; subd. 1 of § 220 and third sentence of § 243.

STOCK OF FOREIGN CORPORATION HELD BY NON-RESIDENT not taxable even prior to amendment by Laws 1911, chap. 732. The fact of the certificate of stock being physically within the state did not affect the rule. *Matter of James*, 144 N. Y. 6. As to stock held by non-resident prior to 1911 amendment in a corporation incorporated in New York and other states vide *Apportionment of Property*.

PRIOR TO AMENDMENT OF SECTION 221 by Laws 1911, chap. 732, in effect July 21, 1911, foreign corporations were not entitled to the exemptions of said section. *Matter of Prime*, 136 N. Y. 347; *Matter of Balleis*, 144 N. Y. 132.

Corporation created by Congress held to be foreign corporation within the meaning of § 221 prior to 1911 amendment. *Matter of Crittenton*, N. Y. Law Journal, April 4, 1911.

NATIONAL BANK, held to be domestic corporation. *Matter of Cushing*, 40 Misc. 505.

FOREIGNER

Vide Treaty; Non-resident; Residence.

FORGIVING DEBT

Vide Schedule A³ *supra*, page 111.

FORMS

Affidavit as to non-residence, page 146.

“ as to value of real estate, page 98.

“ for appraisal, page 87.

“ for appraisal (non-resident estate), page 143.

“ for exemption under § 221, page 687.

“ under § 238, page 61.

“ upon application in non-resident estate for consent under § 227, page 136.

Application for waiver for transfer of securities, page 69.

Notice of appraisal, page 80.

“ of motion under § 2481 of the Code, page 881.

Order amending original order, page 883.

“ appointing appraiser, on petition of estate's representative, page 76.

Order appointing appraiser, on Surrogate's own motion, page 73.

Order appointing appraiser (non-resident estate), page 142.

“ declaring estate exempt, page 84.

Order fixing tax, page 50.

“ “ “ (non-resident), page 157.

“ permitting search of safe deposit box, page 59.

“ remitting penalty, page 724.

Petition for appointment of appraiser, page 74.

“ “ “ “ “ (non-resident estate),
page 139.

Petition to modify decree, page 881.

“ to open safe deposit box, page 57.

“ to remit penalty, page 723.

Report of appraiser in resident estate; page 50.

“ “ “ “ non-resident estate, page 155.

Waiver from state comptroller re opening safe deposit box,
page 60.

Waiver re release of safe deposit box, page 67.

“ re transfer of securities, page 70.

Warrant of state comptroller for return of overpayment,
page 764.

FOURTEENTH AMENDMENT

“The Fourteenth Amendment does not diminish the taxing power of the State.” *Keeney v. New York*, 222 U. S. 525-535, sustaining *Matter of Keeney*, 194 N. Y. 281; *Chanler v. Kelsey*, 205 U. S. 466-478, sustaining *Matter of Delano*, 176 N. Y. 486.

FRACTION OF DAY

As to when death of decedent occurs on same day upon which statute is passed vide *Matter of Dreyfous*, 18 N. Y. Supp. 767; *Matter of Lane*, 157 App. Div. 694-697, *post*, page 809.

FRAUD

Vide second sentence of § 232, *supra*, page 20; *Evasion of Tax*; *Reappraisal*.

FULL FAITH AND CREDIT

Vide *Laws of Another State or Country*; *Comity*.

FUNERAL EXPENSES

Vide Schedule B¹ *supra*, page 124.

FUTURE ESTATES

Vide § 230; *Life Estate*; *Power of Appointment*; *Remainders*; *Superintendent of Insurance*.

GENERAL CONSTRUCTION LAW

The transfer tax law has been continuously in force since the original act of 1885. Matter of Jones, 54 Misc. 202; § 93 of General Construction Law.

GENERAL TAX

The tax is not a general tax. Matter of Enston, 113 N. Y. 174-177, *supra*, page 165, and cases cited *supra*, page 2.

GIFT

- | | |
|---|--|
| (1) Definition of taxable gift. | (5) Unrecorded deed. |
| (2) Proceedings taken upon information given comptroller. | (6) Convincing evidence necessary to establish gift <i>inter vivos</i> . |
| (3) Income or possession reserved by grantor. | (7) Report remitted for additional testimony. |
| (4) Power of revocation not reserved. | (8) Gifts held not taxable. |

Vide Ante-Nuptial Contract; Contemplation of Death; Evasion of Tax; Property Held Jointly or in Trust; Trust Deed.

(1) Definition of taxable gift

A gift, other than by will, is not subject to the tax unless it comes within the meaning and intendment of subdivision 4 of § 220 which provides that a tax shall be imposed "when the transfer is of intangible property, or of tangible property within the state made by a resident, or of tangible property within the state made by a non-resident, by deed, grant, bargain, sale or gift made in contemplation of the death of the grantor, vendor or donor or intended to take effect in possession or enjoyment at or after such death."

For discussion of distinction between a gift "made in contemplation of death" and a gift "intended to take effect in possession or enjoyment at or after such death" vide page 35. For cases of gifts made in contemplation of death vide page 643.

Tax is not limited to transfer of property gratuitously given by will but is extended to all property transferred by will. Matter of Jay Gould, 156 N. Y. 423; Matter of Rogers, 71 App. Div. 461-465, affirmed, on opinion below, 172 N. Y. 617; etiam Matter of Edson, 38 App. Div. 19-22, affirmed, on opinion below, 159 N. Y. 568.

"It is true," said Chief Justice Cullen in Matter of Keeney, 194 N. Y. 281-287, sustained in 222 U. S. 525, sub nom. Keeney

v. New York, "that an ingenious mind may devise other means of avoiding an inheritance tax, but the one commonly used is a transfer with reservation of a life estate. We think this fact justified the legislature in singling out this class of transfers as subject to a special tax."

(2) Proceedings taken upon information given comptroller

In reply to letter from surrogate of Chemung County the comptroller wrote an opinion, dated April 16, 1913, 2 State Department Reports, 497-500, in which he said, *inter alia*: "Occasionally proceedings are instituted by a surrogate 'upon his own motion,' where he believes an attempt was made to avoid the statute or the acts of the parties would indicate such an intention. And it frequently happens that information is given the comptroller or his attorney as to the disposition of property by a decedent a short time prior to his death from which an estate otherwise exempt is rendered taxable."

"THE COUNTY CLERK of each county, except in the counties where the registers perform the duties of the county clerk with respect to the recording of deeds, and when in such counties the registers, shall, at the same times, make reports containing a statement of any deed or other conveyance filed or recorded in his office, of any property, which appears to have been made or intended to take effect in possession or enjoyment after the death of the grantor or vendor * * * which shall be immediately forwarded to the state comptroller." Section 239.

(3) Income or possession reserved by grantor

Decedent deeded without adequate consideration to her cousin certain real estate and on the same day the cousin leased, without rent, the real estate to decedent for life, by which arrangement the decedent retained absolute possession and actually had the income of the transferred property until her death. In declaring the transfer taxable under subdivision 4 of § 220, Surrogate Sexton, Oneida County, in Matter of Dobson, 73 Misc. 170, summarizes his conclusions by saying: "The whole transaction looks to me like a varnished attempt to evade the Transfer Tax Law. It was not a *bona fide* sale for a consideration, but a gift by deed of \$80,000 worth of real estate for such companionship and care as Thomas (the grantee) might feel equal to. Dobson (the decedent), sold the cow, but hung on to the tail and milk. On the evidence in this case, the

title of Thomas was as fruitless and barren as was Samson's mother before the angel called. The woman with every other requisite awaited the germ of life; so Thomas sat on the sands of a barren title, awaiting Dobson's death for full fruition."

As to transfer in trust intended to take effect at or after death vide *Matter of Keeney*, 194 N. Y. 281-287, sustained in 222 U. S. 525, sub nom. *Keeney v. New York*, and cases cited sub *Trust Deed*.

GIFT ABSOLUTE ON ITS FACE HELD TAXABLE under the circumstances of the case. "The evidence clearly shows that Rufus was to be the custodian or manager of the property and that the transfer to him although absolute in form was merely for the accomplishment of that purpose." *Matter of John Palmer*, 117 App. Div. 360-369.

About ten years before his death decedent in *MATTER OF NEWMAN COWAN*, N. Y. Law Journal, July 24, 1913, made and delivered to his daughter and to his two sons deeds of certain New York real estate. Each of said deeds contained the following clause: "Excepting and reserving, however, to the said Newman Cowan, party of the first part hereto, the full use and absolute control of all of said premises hereinabove described, and all of the rents, issues and profits hereof, during the term of the natural life of the said Newman Cowan."

Surrogate Cohalan held that the transfer of the real property was a gift intended to take effect at death of the grantor and therefore taxable under the provisions of subdivision 4 of § 220.

(4) Power of revocation not reserved

GIFT OF STOCK WITH RESERVATION OF RIGHT TO VOTE STOCK and upon condition that all dividends to be paid to donor until death, held taxable although no power of revocation reserved. *Matter of Brandreth*, 169 N. Y. 437-442.

GIFT OF SECURITIES UNDER AGREEMENT that the donor should have during his lifetime "all or such part of the net income of such securities as he might wish" held taxable. No power of revocation was reserved. *Matter of Cornell*, 170 N. Y. 423. Vide etiam *Matter of Webber*, 151 App. Div. 539-540.

CAUSA MORTIS GIFT subject to revocation at all times during lifetime of the giver takes effect after death of grantor and is subject to tax. *Matter of Edwards*, 146 N. Y. 380, *supra*, page 194; *Matter of Birdsall*, 22 Misc. 180-195, affirmed, without opinion, 43 App. Div. 624.

(5) Unrecorded deed

Decedent five years prior to his death had executed deeds of his farms to his son and to members of his son's family, the deeds remaining unrecorded, and in possession of grantor. The testimony indicated that the grantees were not in possession of the farms described in the deeds, and that it was not intended that they should be until his death. Held, taxable. *Matter of Jones*, 65 Misc. 121.

IN *MATTER OF SHARER*, 36 Misc. 502, the decedent had a metallic box which he kept at his bank. On this box he had pasted a paper upon which he had written his name and also the name of his sister-in-law. After the decedent's death there was found in this box unrecorded deeds from himself to said sister-in-law and also executed assignments of certain stock and a mortgage, and certificates of deposit endorsed on the back by him to the order of another sister-in-law. The several documents were in envelopes on which the decedent had written "the property of" with the name of the person.

The executors claimed that the property in this box passed by the instruments described and was not taxable in the estate of the decedent. The state claimed that the alleged transfers were incomplete and ineffectual because not delivered and, if valid, that they were not intended to take effect in possession and enjoyment until at or after the death of the decedent. Surrogate Devendorf, Herkimer County, held that the property was subject to the tax, saying: "I have considered the case carefully and am convinced that the deceased never intended to and in law did not part absolutely with his bank stock, railroad stock, certificates of deposit, the Keller and Daily mortgages and the real estate mentioned.

"It is true that he signed certain papers which if delivered in good faith and followed by a change of possession and acts of ownership on the part of the transferee would be good and effectual to carry absolute and title away from him; but to all the world after the date of the alleged delivery he continued to be and remain the owner of the property as before; the property was not within the reach of either Margaret or Julia Caldwell when it went to Sharer's private box at the bank; he received the income from it and so far as can be determined treated it as his own; he still exercised dominion over it and did not permit the transfer to take effect so far as the use or control of the property was concerned during his life.

"Whatever may be alleged as to the legality of the execution of the papers and the alleged subsequent delivery thereof, yet the property was so managed and such management acquiesced in by the parties that the transfer if any took effect after Sharer's death."

(6) Convincing evidence necessary to establish gift inter vivos

IN MATTER OF LAWRENCE, N. Y. Law Journal, February 15, 1913, Surrogate Fowler said, *inter alia*: "Under the law of this State, in order to establish a valid gift, it is necessary to show that the donor delivered to the donee the property constituting the gift, or that such delivery was made to some one authorized to accept the gift on behalf of the donee (Matter of Bolin, 136 N. Y. 177; Gannon v. McClure, 160 N. Y. 484). In the matter under consideration there is no proof that the decedent delivered the bonds in question to any of the parties claiming title thereto.

"From the evidence adduced before the appraiser it appears that the safe deposit vault in the National Park Bank in the City of New York was rented by the decedent, that he was the only lessee of the vault and that no one except him had a key to the vault. It also appears that when the safe deposit box was opened after his death there were found therein nine bundles containing bonds, each bundle being held together by one or more rubber bands. Five of the bundles had pinned to the top bond of each bundle a small piece of white paper, on which was written in each case the name of decedent and an abbreviated description of the bonds in that particular bundle. It is admitted that the bonds in these five bundles belonged to the decedent. The other four bundles contained the bonds in controversy.

"One of these bundles consisted of seventy bonds which were held together by one or more rubber bands. On the top of the bonds, but under a rubber band, was a National Park Bank Safe Deposit Vault manila envelope. On this was written in decedent's hand writing the words 'Nanine L. Pond.' The envelope itself was unsealed and contained nothing. Pinned to the envelope was a piece of white paper on which was written, but not in decedent's handwriting, the name 'Nanine L. Pond,' with an abbreviated description of the bonds. The bundle was divided into six sub-bundles, one for each kind of bond, the bonds of each kind being in turn held together by a

separate rubber band and having a smaller National Park Bank Safe Deposit envelope on the top of it. The words 'Nanine L. Pond,' together with a description of the particular kind of bond, were written on each envelope.

"There was another bundle with the name 'Josephine B. Lawrence' written in the handwriting of the decedent on the large manila envelope, and containing slips of paper and small envelopes indorsed similarly to those in the Nanine L. Pond bundle. This bundle contained seventy bonds. There was also a bundle with the name 'Ethel K. Lawrence' written on the large manila envelope and containing six bonds of the par value of one thousand dollars each. There was another bundle having the name 'Edward R. True, Jr.,' written on the large envelope and containing twenty bonds.

"These bonds were all coupon bonds and transferable by delivery. They were kept in the safe deposit vault for nearly one year after the death of decedent and the interest collected by the executors. The fact of their being in the safe deposit box which was rented exclusively by the decedent, and the key to which was kept in the possession of the decedent, would necessarily raise a presumption that the bonds and other property in the box capable of being transferred by delivery belong to the decedent. This presumption could of course be rebutted by proof that the bonds were delivered to the decedent for safe-keeping, or for any other purpose not inconsistent with a claim of title in third parties. No such proof was adduced before the appraiser, and according to the duly authenticated records of the Court of Probate for the First District of New London, Connecticut, no such proof was adduced before that court. The decedent may at some time have intended to give these bonds to the persons whose names appeared upon the envelopes in the different bundles or he may have intended that the bonds should go to them upon his death. If the decedent had intended to make a gift of the bonds to the persons whose names were written by him on the envelopes, but had not consummated the gift by delivery, the bonds were the property of decedent at the time of his death (*Gegan v. Union Trust Co.*, 129 App. Div. 184, aff'd 198 N. Y. 541).

"According to the law of this State a gift will not be presumed; it must be established by evidence that is clear and convincing (*Tompkins v. Leary*, 134 App. Div. 114; *Devlin v. Greenwich Bank*, 125 N. Y. 756). It therefore appears that the decedent

did not make a valid gift *inter vivos* of the bonds to the persons whose names appeared upon the envelopes attached to the respective bundles. There is no evidence whatever that the decedent intended that the bonds should become the property of the alleged donees at the time of his death, and there is no evidence to sustain the finding of the appraiser that the bonds were given by the decedent in contemplation of death or as a gift intended to take effect at or after his death. It appears that the claimants were non-residents of this State at the time the State Comptroller commenced proceedings to determine the transfer tax upon the estate of the decedent, and that he was therefore unable to compel their appearance before the appraiser. As they were the only parties whose knowledge of the transaction constituting the alleged gift would enable the appraiser to properly determine whether the decedent intended to dispose of the property to the claimants as a gift intended to take effect at or after his death, it was incumbent upon them to explain, either by affidavit or testimony, how the bonds which they claim to be their property were in the possession of the decedent at the time of his death. In the absence of such explanation to rebut the presumption of ownership in the decedent this court must hold that for the purpose of determining their liability to a transfer tax in this State the bonds were the property of the decedent at the time of his death. The order fixing tax will be reversed and the appraiser's report remitted to him for correction as herein indicated."

Another portion of the opinion of the Lawrence case is quoted, *supra*, page 317.

As to ownership of property in SAFE DEPOSIT BOX vide Matter of Francis, N. Y. Law Journal, August 12, 1913, *supra*, page 749.

IN MATTER OF LOEWI, 75 Misc. 57, decedent a little over a year before his death told his son that he was getting old (he was seventy-two) and would like to give his children something; that his son should go to his safe deposit vault and take out certain bonds and mortgages and if any of his children needed any of the bonds to give the bonds to them. There was no evidence that the decedent spoke to any of his children, except his son, about the alleged gift. The interest on the securities was paid to decedent up to the time of his death. The testator's will divided his property equally among his children. Held, that the transfer of the securities was taxable.

GIFT INTER VIVOS held under the circumstances of the case to be made in contemplation of death, and therefore taxable. *Matter of Birdsall*, 22 Misc. 180-193-197, affirmed, 43 App. Div. 624.

Vide cases cited under subdivision 8, *post*, page 705, for GIFTS HELD NOT TAXABLE.

(7) Report remitted for additional testimony

In *Matter of John Loster*, N. Y. Law Journal, July 29, 1913, the appraiser reported that the sum of \$20,000 was given by the decedent to one Christine Cherry as a gift intended to take effect after death, and that it was therefore subject to the provisions of subdivision 4 of § 220.

Surrogate Cohalan remitted the report of the appraiser for additional testimony, saying: "The executor contends that this sum was a valid indebtedness of the decedent to Christine Cherry, as evidenced by the following memorandum: 'Sixty days after death pay to the order of Christine Cherry twenty thousand dollars at 44 Greenwich St., N. Y. City. Value received. John Loster.' A promissory note must contain the positive engagement of the maker to pay at a certain fixed or determinable future time (*Carnwright v. Gray*, 127 N. Y. 92). A note or engagement on the part of the debtor to pay a certain sum at a certain fixed time after his death is valid as a promissory note (*Hegeman v. Moon*, 131 N. Y. 462; *Root v. Strang*, 77 Hun, 14). If the instrument above quoted were a promissory note, the fact that it was payable sixty days after the death of the maker would not affect its validity. But it is not a promissory note, because it does not contain the unconditional promise of the maker to pay the amount therein mentioned (sec. 320, Negotiable Instruments Law). John Loster does not by the instrument above quoted promise to pay to Christine Cherry \$20,000, or any other sum, nor does he direct his executor or administrator to make the payment.

"While he may have intended that his executor should pay Christine Cherry the sum of \$20,000, he did not make such a direction in the instrument referred to, and this court cannot supply the omission. The memorandum therefore is not a promissory note. Neither is it an acknowledgment of indebtedness, because it does not allege that the decedent was indebted to Christine Cherry in the sum of \$20,000, or any other sum. From the testimony taken before the appraiser it

appears that Christine Cherry was employed by the decedent for many years in connection with the conduct of his business, and that at the time he delivered to her the memorandum above referred to he stated that because of the assistance she had rendered to him and the faithful services which she had performed 'she ought to receive a greater amount or part of my estate, because there is no one that I care particularly to leave it to.'

"If she had rendered services which in the opinion of the decedent were worth \$20,000, the payment to her of that sum would be in satisfaction of her claim for such services and would not be subject to a tax. If, on the other hand, it was paid to her not in satisfaction of a valid, enforceable claim against the decedent, but as a gift intended to take effect after death, it would be subject to a tax.

"The testimony taken before the appraiser does not show that the decedent gave Christine Cherry the sum of \$20,000 as a gift intended to take effect after his death. Neither does it show that that sum was given by the decedent in satisfaction of a valid indebtedness existing against the decedent and in favor of Christine Cherry. It will therefore be necessary to remit the appraiser's report to him for the purpose of taking additional testimony on this point."

(8) Gifts held not taxable

A conveyance and agreement by which absolute title and immediate possession passed to grantee, with no power of revocation reserved to grantor, subject to the maintenance of grantor and wife, held not taxable. *Matter of Hess*, 110 App. Div. 474, affirmed, on opinion below, 187 N. Y. 554, *supra*, page 340.

Decedent three years prior to death transferred and delivered to his daughter and two grandsons certain stock, but said stock still continued in name of donor on the books of the corporation and the dividends were paid to him. No express contract was shown to support a trust or reservation. Nothing was said on the subject between the donor and the donees. It was not shown that there was bad faith, or that the gifts were made with the intent of evading the tax. Held, not taxable. *Matter of Bullard*, 76 App. Div. 207.

Vide *Matter of Edgerton*, 35 App. Div. 125, affirmed, without

opinion, 158 N. Y. 671, *supra*, page 227; Matter of Thorne, 162 N. Y. 238, *supra*, page 236.

AN OLD MAN, SOMEWHAT ENFEEBLED, made gifts of \$1,500,000 which were held not taxable as there was nothing in the evidence "to indicate to the decedent at the time the gifts in question were made that he was in immediate danger of death." Matter of Spaulding, 49 App. Div. 541-547, affirmed on opinion below, 163 N. Y. 607. Vide Contemplation of Death.

GIFT TO A CLASS

Vide Matter of Hogg, 156 App. Div. 301.

GOOD-WILL

- (1) Principle involved is akin to that of Closely Held Stock.
- (2) Defined.
- (3) Good-will is subject to tax.
- (4) Each case must be considered and determined in the light of the facts surrounding and connected with it.
- (5) The general rule for valuation.

Von Au v. Magenheimer.

Matter of Silkman.

" " Keahon.

" " Rosenberg.

Matter of Weatherbee.

" " Klauber.

- (6) Elimination of decedent from business may be taken into consideration. Personality of decedent.
- (7) Basis of valuation should be the profits prior to death.
- (8) Firm name.
- (9) Where partnership agreement provides method of determining value of good-will.
- (10) When decedent's interest in good-will passes to surviving partners.

(1) Principle involved is akin to that of Closely Held Stock

The subject of the good-will of a business is interwoven in principle with the adjudications of the courts relative to the valuation of securities not customarily bought and sold in the open market. Surrogate Varnum held in MATTER OF GEORGE JONES, 28 Misc. 356-358, that in the valuation of the stock of the New York Times, a joint-stock association, there should be included "the appraisal of the estimated value of the good-will" of the NEW YORK TIMES. The Appellate Division in passing upon this phase of the surrogate's order said, 69 App. Div. 237-244: "We agree, however, with the surrogate that the value of the good-will of this association in the *Times* newspaper was property which passed under the will of the testator and was taxable. The association, as before stated, was organized to

conduct and publish a newspaper called 'The New York Times.' That paper had been published for many years in New York and had become a valuable property. It belonged to the association. It went to make up the property of the joint-stock association and was transferrable as such."

The Court of Appeals reversed the Appellate Division on other points in the case, but sustained both the Appellate Division and the surrogate regarding the good-will, the court saying (172 N. Y. 575-586) in affirming the order of the surrogate: "These shares were not listed upon the Stock Exchange or sold in the open market, and the only way to get at their value was to ascertain the property they represented." Vide Matter of Pulitzer, N. Y. Law Journal, December 10, 1912, *supra*, page 624.

IN MATTER OF BRANDRETH, 28 Misc. 468-473, there was involved the valuation of the stock of the Porous Plaster Company, a corporation whose stock was not dealt in. The appraiser fixed the value of the shares by taking in consideration the good-will of the business and Surrogate Silkman upheld him in so doing, the surrogate being affirmed in 159 N. Y. 437-443. Vide Matter of Valentine, N. Y. Law Journal, March 13, 1913, *supra*, page 619.

It is apparent, therefore, that the cases regarding the valuation of good-will should be read in connection with the cases discussed sub Closely Held Stock, *supra*, page 612.

(2) Defined

"Good-will," said Justice STORY, "may be properly enough described to be the advantage or benefit which is acquired by an establishment beyond the mere value of the capital, stock, funds or property employed therein, in consequence of the general public patronage and encouragement, which it receives from constant or habitual customers, on account of its local position or common celebrity or reputation for skill, or influence, or punctuality, or from other accidental circumstances or necessities, or even from ancient partialities or prejudices." Boon v. Moss, 70 N. Y. 465-473.

IN AUSTEN v. BOYS, 27 L. J. Ch. 714, Lord CRANWORTH said: "* * * When a trade is established in a particular place, the goodwill of that trade means nothing more than the sum of money which any person would be willing to give for the chance of being able to keep the trade connected with the place

where it has been carried on. It was truly said in argument that goodwill is something distinct from the profits of a business, although, in determining its value, the profits are necessarily taken into account, and it is usually estimated at so many years' purchase upon the amount of those profits."

"Good will embraces at least two elements," said Justice VANN, "the advantage of continuing an established business in its old place, and of continuing it under the old style or name. While it is not necessarily altogether local, it is usually to a great extent, and must, of necessity, be an incident to a place, an established business or a name known to the trade." *People v. Roberts*, 159 N. Y. 70-83.

"Lord ELDON's famous definition, 'the probability that the old customers will resort to the old place,' is not so literal as to mean that the customers must actually come to the old place, but simply that old customers will continue." *Matter of Silkman*, 121 App. Div. 202-216.

(3) Good-will is subject to tax

Vide digest of *Matter of Vivanti*, 206 N. Y. 656, *supra*, page 387.

The good-will of *R. G. DUN* was held by Surrogate Thomas in *Matter of Dun*, 39 Misc. 616, not to be subject to the transfer tax. He reversed his previous ruling, however, in *Matter of Dun*, 40 Misc. 509, upon the ground that the Court of Appeals in *Matter of Hellman*, 174 N. Y. 254, *supra*, page 276, had held that the definition of property whose transfer was subject to the transfer tax was contained in the then § 242, now the first sentence of § 243, *supra*, page 30.

In his second opinion the surrogate said at page 510 of 40 Misc.: "The good-will of the business of the decedent is a right, exclusive in him and in those to whom he has given it by his will, to continue that business under the name used by him. It is clearly a thing capable of being the subject of ownership, and it is stipulated to have a large value. It is, therefore, property and its value was properly included in the appraisal."

Surrogate Beckett, in *Matter of Keahon*, 60 Misc. 508, said:

"As the business under consideration was conducted and carried on by the administratrix in decedent's name the good-will of the business is in fact an asset in her hands (*Matter of Mullon*, 74 Hun, 358), and as such it is taxable." *Matter of Keahon*, 60 Misc. 508.

(4) Each case must be considered and determined in the light of the facts surrounding and connected with it

"The precise value may be difficult of ascertainment in any way short of actual sale." *MATTER OF VIVANTI*, *supra*, page 388.

"The industry of counsel," said Justice Rich, "has not resulted in the citation of any case in this country in which a specific rule for the determination of the value of good will is declared; no rigid and unvarying rule can be laid down by the courts in this class of cases. Each must be considered and determined in the light of the facts surrounding and connected with it. Within proper limits THE DETERMINATION OF SUCH QUESTION MUST BE LEFT TO THE JURY, but their conclusion must rest upon evidence legitimately tending to establish value and supporting their verdict. * * * It cannot be determined by courts as a question of law." *VON AU v. MAGENHEIMER*, 115 App. Div. 84-86; *Matter of Silkman*, 121 id. 202-218.

(5) The general rule for valuation

"Our courts have not adopted the rigid rule, established by the English courts, of limiting the value of good will to one year's purchase of the net annual profits of the business calculated on an average of three years (*Mellersh v. Keen*, 28 Beav. 453) or that three years' net profits of a business arbitrarily represents the value of its good will (*Page v. Ratcliffe*, 75 L. T. Rep. 371), but on the contrary incline to the more equitable rule that THE VALUE OF GOOD WILL MAY BE FAIRLY ARRIVED AT BY MULTIPLYING THE AVERAGE NET PROFITS BY A NUMBER OF YEARS, such number being suitable and proper, having reference to the nature and character of the particular business under consideration, and the determination of such proper number of years should be submitted to and determined by the jury as a question of fact, dependent upon the evidence before them in each action." *VON AU v. MAGENHEIMER*, 115 App. Div. 84-87; *Matter of Silkman*, 121 id. 202-218.

At the first trial of the case of *VON AU v. MAGENHEIMER*, *supra*, the jury found the good will of the business of Mason, Au & Magenheimer Confectionery Company to be thirteen times the average annual net profits. The Appellate Division (115 App. Div. 84) reversed the judgment upon the ground that the verdict was excessive and granted a new trial.

Upon the second trial the jury found that the good will was worth approximately six times the average annual net profits.

The Appellate Division (126 App. Div. 257) affirmed the judgment, Justice Miller saying, page 270: "In view of all the surrounding circumstances I do not think the verdict was excessive."

In *MATTER OF SILKMAN*, 121 App. Div. 202, it was held that two years' purchase of the average annual profits for the preceding three years was the proper value of the good will of Thurston & Braidich, a firm engaged in the business of "the import and retail of vanilla beans, gums and merchandise."

In *MATTER OF KEAHON*, 60 Misc. 508, Surrogate Beckett held: "In ascertaining the value of good will it is necessary to determine the amount of capital employed in the business. The appraiser finds, from the affidavit submitted to him by the administratrix, that the gross value of the assets of the business was \$43,610.02. Among the liabilities is an item of \$26,500, notes due the Gansevoort Bank, but as the decedent had large holdings of real estate, and there is no evidence to show that he borrowed this money to be used in the *TRUCKING BUSINESS*, it cannot be considered a liability of the business. Excluding this item, the liabilities amount to \$12,950.44. Deducting said amount from the total assets leaves a net capital of \$30,659.58. The evidence before the appraiser shows that for the years 1905 and 1906 the average net annual profits were \$26,679. Deducting from this \$5,000, as salary of the decedent for managing the business, leaves \$21,679, and subtracting from this the interest on the capital, namely \$1,839.57, leaves an annual net profit of \$19,839.43.

"While the courts in this country have not adopted any inflexible rule for ascertaining the value of the good will based on earnings, the Appellate Division in *VON AU v. MAGENHEIMER*, 115 App. Div. 84, suggested that the proper rule would be to multiply the net earnings by a certain number of years, the number depending upon the nature of the business. In the second trial of that case the jury found the value of the good will to be approximately six times the average annual net earnings, and the court refused to set the verdict aside as excessive. *VON AU v. MAGENHEIMER*, 126 App. Div. 257.

"In *MATTER OF ROSENBERG*, Surr. Dec. 1908, p. 265, Surrogate Thomas computed the value of the good-will at twice the amount of the annual net profits, but in that matter the business was conducted by decedent under a monthly lease, so that it lacked permanence and stability.

"In the matter before us the business was conducted by decedent for a period of about fifteen years; the amount of business done and the generally high commercial standing of its customers would indicate that it was well and favorably known, and the fact that the net profit upon a comparatively small capital was about \$26,000 per annum would suggest that it was decidedly profitable. As it was not a business that depended upon any special qualifications in the decedent, the good-will must necessarily be valuable. I have concluded that a conservative estimate of the value of the good-will would be three times the annual net profits or \$59,518.29. The order fixing tax should be reversed and report remitted to appraiser, so that he may reduce the value of the good will from \$100,000 to \$59,518.29."

IN MATTER OF EDWIN H. WEATHERBEE, N. Y. Law Journal, November 5, 1913, there were cross appeals, under the provisions of the first sentence of § 232, *supra*, page 20, from the order of the surrogate entered under the provisions of the first sentence of § 231, *supra*, page 19. The executors were dissatisfied upon the ground that the valuation of the good will was excessive, and the state comptroller upon the ground that it was insufficient. Surrogate Cohalan held: "The decedent was the owner of the dry goods business conducted at Broadway, Fifth avenue and Nineteenth street, in the Borough of Manhattan, under the name of ARNOLD, CONSTABLE & Co. The evidence adduced before the appraiser shows that the average annual net profits of the business, exclusive of the interest on capital, was \$15,733.28. The appraiser added \$10,000 to this amount and then multiplied the sum by five, the result being his estimate of the value of the good will. As the \$10,000 added to the average annual profits was the interest on capital invested in the business by the representatives of retired partners, it did not constitute any part of the net profits and should not have been included as such in ascertaining the value of the good will.

"The business has been conducted under the name of Arnold, Constable & Co. for more than thirty years; it transacts a large volume of business; it has an established reputation in the dry goods trade; its principal place of business is located in a prominent part of the city, and it is favorably known to the residents of this city as well as to those of suburban towns. It enjoys the advantages derived from extensive advertising, a prominent and conspicuous location and a long course of successful busi-

ness dealings. Its good will, therefore, is relatively much more valuable than that of a business conducted in an obscure location and necessarily catering to a limited number of customers. I am inclined to think that a conservative estimate of the value of the good will would be a sum which at TEN PER CENT. interest per annum would produce the amount found by the appraiser to be the net average annual profits, exclusive of interest on capital. This would make the value of the good will \$157,332.80."

In *MATTER OF DAVID KLAUBER*, N. Y. Law Journal, May 17, 1913, Surrogate Fowler held that "as the good will of the business of Klauber, Horn & Co. was not purchased by the firm of Klauber Bros. & Co., the profits of the former should not be taken into consideration in appraising the value of the good will of the latter. Klauber Bros. & Co. not having made any profits in the conduct of its business from the time of its formation until the date of decedent's death, its good will had no monetary value at that time. The order fixing tax will be modified in accordance with this decision and the terms of the stipulation heretofore filed." Appeal pending.

Vide etiam *Matter of Case*, 122 App. Div. 343.

(6) Elimination of decedent from business may be taken into consideration

If the decedent has been a dominating or important factor in the business, that fact must be taken into consideration in the valuation of the good-will. *Matter of Bach*, N. Y. Law Journal, November 21, 1911, opinion quoted, *supra*, page 617; *Matter of Rees*, 208 N. Y. 590, digested, *supra*, page 392.

That it is a very difficult matter to arrive at any reliable estimate of what allowance should be made, is very succinctly expressed in the English work on "Good Will and its Treatment in Accounts" (1897), by Lawrence R. Dicksee, F. C. A. Mr. Dicksee viewed the problem from the standpoint of an accountant dealing with the proper provision to be made for the cost of management, but his remarks have a bearing, nevertheless, upon the subject under discussion. He says at page 7: "There is, however, a further fact to be taken into consideration, and that is that a business which requires its proprietor to expend in its management a considerable amount of time and skill is less valuable than one which will produce an equal income without any such expenditure. It is less valuable because, unquestionably, it will be found that in the open market it would

realise less money, but in addition to that (as a matter which would have to be taken into consideration in any disinterested valuation), it is important to remember that, when a man pays for good will, he pays for something which places him in the position of being able to earn more money than he would be able to do by his own unaided exertions. To take an extreme case, for instance, no man who places any value upon his time would pay anything for an undertaking, which, after providing 5 per cent. interest on its capital, did not show a further profit in excess of the amount which the purchaser might be sure of earning anywhere else, without any outlay whatever.

“In order, therefore, to arrive at a real basis by which the value of one business can be compared with that of another, provision must be made, not only for interest on the capital employed, but also for the value of such services as have been rendered to that business by its proprietor, and not already been charged against profits. In the case of a business under management, where the proprietors do no work, no such reduction need, of course, be made; but where the proprietors have to exercise a certain amount of supervision, it is necessary, in order to arrive at a real basis of comparison, to deduct from the profits, in addition to interest, a sum which (as near as may be calculated) would represent the amount which the proprietor would have to pay a manager to do his work.”

THE PERSONALITY of decedent may very well have contributed to produce the result of a profitable business, and thus would become an element to be reckoned with, in addition to that of the mere cost of management.

What the individuality of the decedent may have meant in dollars and cents to the business is, of course, a quantity varying with the circumstances of almost every case. If the practitioner deems it to have been an essential part of the profit producing power of decedent's business, he should be careful to place in the record taken before the appraiser a complete statements of facts pertinent to the enquiry.

(7) Basis of valuation should be the profits prior to death

In *MATTER OF SILKMAN*, 121 App. Div. 202, Justice Jenks, at page 218, said: “But I do not think that the valuation of the good will made by the decree should stand. The learned surrogate wrote in his opinion that in the case at bar two years' purchase on the amount of the profits was as little as should be

allowed, and that he was by no means clear that the allowance should not be more liberal. He took the average annual profits for three years succeeding the death of Mr. Braidich, and calculated fifty per cent of the annual profits for two years. I think that while the process may be approved, the basis should be the annual profits before the death of the testator."

Apparently it is not error to allow the introduction in evidence of balance sheets of subsequent years, they being "admissible for the purpose of comparison." *Von Au v. Magenheimer*, 126 App. Div. 257-270. *Vide etiam Matter of Pulitzer, supra*, page 624.

(8) Firm name

In *SLATER v. SLATER*, 175 N. Y. 143, the court discussed §§ 20 and 21 of the Partnership Law, and held, page 150: "1st. On the facts of this case the right to continue the use of the firm name is a firm asset and does not inure to the benefit of the surviving partner. 2nd. The purchaser at the sale provided for in the decree, whether surviving partner or otherwise, will acquire the right to continue the business under the firm name upon complying with the provisions of the statute."

(9) Where partnership agreement provides method of determining value of good will

Vide digest of Matter of Vivanti, 206 N. Y. 656, *supra*, page 387.

(10) When decedent's interest in good will of partnership passes to surviving partners

In *MATTER OF GEORGE FREDERICK VIETOR*, N. Y. Law Journal, May 8, 1913, Surrogate Fowler held: "The decedent died January 29, 1910, a resident of the County of New York. At the time of his death he was a member of the firm of Frederick Viotor & Achelis, a copartnership having its principal place of business in the City of New York. The transfer tax appraiser found that the decedent had no taxable interest in the good will of the business conducted by the said firm, and from the order entered upon his report the State Comptroller has taken this appeal.

"THE GOOD WILL OF A BUSINESS IS AN ASSET OF THE ESTATE OF A DECEASED PARTNER IN THE HANDS OF HIS EXECUTORS, AND AS SUCH ITS TRANSFER IS SUBJECT TO A TAX (*Matter of Vivanti*, 138 App. Div. 281; *Von Au v. Magenheimer*, 126 App. Div.

257). As the firm of Frederick Vietor & Achelis was formed in 1841, and continued to transact the same general line of business from the time of its establishment until the time of decedent's death, and realized large profits from the conduct of its business, its good will constitutes a valuable asset (*Johnson v. Roberts*, 159 N. Y. 83).

"Unless the decedent's interest in this good will passed to the surviving partners by virtue of a contract or agreement entered into between the partners themselves, it should be included in the taxable assets of his estate. From the evidence adduced before the appraiser it appears that at the time of the formation of the partnership in 1841 no written articles of copartnership were entered into. In 1903 the first written copartnership agreement was executed. This agreement provided that the partnership was to continue on the same terms as had regulated the conduct of the business and the respective rights and duties of the partners during the preceding years, except as therein modified. As the prior partnership agreement was not in writing, and the agreement of 1903 did not purport to be in itself a complete recital of the rights, interests and liabilities of the partners, but merely a modification of the prior oral agreement, parol evidence was admissible before the appraiser to show the terms of that agreement. From the evidence so adduced it appears that at the time of the death of one of the original members of the firm his interest in the business was ascertained as between the executors and the surviving partners to be the amount placed to his credit upon the private ledger of the company at the first semi-annual accounting which took place after his death. Nothing was included as assets of the partnership except what was treated as assets at the annual accounting between the partners, namely, merchandise, moneys and securities. Upon the death of the other original member of the firm his interest in the partnership was determined and adjusted in the same manner. In neither case was the good will of the business taken into consideration as an asset of the firm. On the retirement of Fritz Achelis, another member of the firm, his interest in the partnership was determined and adjusted in the same manner as the interests of the original partners, no account being taken of the value of the good will of the business.

"On November 9, 1906, supplementary articles of copartnership were executed, by which it was provided that the legal representatives of a deceased partner should be entitled to re-

ceive at the next semi-annual accounting after such partner's death the same share of the profits which said deceased partner would be entitled to if living, and after that accounting his interest, as so ascertained, should not be entitled to any more profits or liable for any losses. Carl L. Viotor, one of the partners of the firm since 1871, and who was a member of the firm prior to the death of the original members, deposed that it was the intent and meaning of the partnership agreement that a deceased or retiring partner was only to receive such part of the assets of the firm as he was entitled to under the semi-annual statement or accounting, and that the good will was to belong exclusively to the surviving partners thereafter continuing the business. It would therefore appear that by the IMPLIED AGREEMENT of the parties, as evidenced by their conduct on every occasion when it became necessary to ascertain the value of the interest of a deceased or retiring partner, the good will of the business was to belong exclusively to the surviving partners, and that the executors of a deceased partner had no right thereto or interest therein. That partners have the right to make such an agreement between themselves is recognized by the courts of this State (*Slater v. Slater*, 175 N. Y. 148). Therefore, as the decedent's interest in the good will of the firm of Frederick Viotor & Achelis did not constitute any part of his estate, and did not pass to his executors, the appraiser was correct in refusing to include it in the taxable assets of decedent's estate.

"But the comptroller contends that if the decedent's interest in the good will of the business did not pass to his executors, it must have passed to the surviving partners as a gift intended to take effect at or after death. If it were such a gift it would be subject to a tax (*Matter of Palmer*, 117 App. Div. 360). But the evidence shows that it was not a gift from the decedent to the surviving partners, but a right which accrued to them by virtue of the contract or agreement of copartnership. Such a right or interest is not subject to the provisions of the Transfer Tax Law (*Matter of Hess*, 110 App. Div. 476, *aff'd* 187 N. Y. 554; *Matter of Baker*, 83 App. Div. 530, *aff'd* 178 N. Y. 575). The appeal of the State Comptroller must therefore be overruled."

GRADED RATES OF TAX

Vide *Matter of Schwarz*, 209 N. Y. mem., *supra*, page 309. For tables and discussion vide page 45.

For graded rates of tax under Laws of 1910, chap. 706, in effect July 11, 1910, repealed by Laws 1911, chap. 732, in effect July 21, 1911, vide *supra*, page 43, and Matter of Jourdan, 206 N. Y. 653, *supra*, page 386.

GRANDPARENT

Entitled to one thousand dollars exemption, and subject to the rates of tax set forth in subd. 2 of § 221a, *supra*, page 47.

GRANTEE

For discussion of subdivision 4, of § 220, vide page 35; etiam cases cited sub Contemplation of Death; Gift.

As to transfers for a consideration, vide page 37.

GRATUITY FUND

Vide Matter of Fay, 25 Misc. 468, cited sub Life Insurance.

GUARDIAN

Vide Special Guardian.

HALF BLOOD, RELATIVES OF

Vide *supra*, page 46.

HIGHEST RATE

Vide Remainders; etiam the sixth paragraph of § 230 and the last two paragraphs of § 241 relative to refund of tax; and footnote to Matter of Brez, *supra*, page 273. Vide etiam Matter of Eaton, 55 Misc. 472-476.

HISTORY OF LAW

Vide page 2, and cases cited sub Constitutionality; Exemptions; Non-Resident.

HOSPITAL CORPORATION

Exempt under first sentence of § 221. Matter of Higgins, 55 Misc. 175. Vide cases cited sub Exemptions.

HUMANE SOCIETIES

Vide Enforcement of Laws Relating to Children or Animals.

HUSBAND

Entitled to five thousand dollars exemption and the minimum rates of subd. 1 of § 221a; *supra*, page 45.

Prior to the adding of the last sentence of § 243 by chap. 732, Laws 1911, in effect July 21, 1911, the personal estate of a woman who died intestate, leaving a husband and no descendants was not subject to transfer tax. *Matter of Green*, 144 App. Div. 232.

Prior to said amendment curtesy was held not taxable. *Matter of Starbuck*, 201 N. Y. 531. *Vide supra*, page 36.

HUSBAND OF A DAUGHTER, subd. 1, § 221a, is entitled to exemptions and rates of subd. 1 even though daughter has predeceased decedent, and husband has married again. *Matter of Ray*, 13 Misc. 480.

IN MATTER OF BLANCHE L. ANDREWS, N. Y. Law Journal, February 21, 1912, it was held that where a woman dies leaving a husband and no descendants, and her will by which she bequeaths all her personal property to her husband is duly admitted to probate, he takes such property by virtue of the provisions of the will and not *jure mariti*, and its transfer is taxable. In his opinion Surrogate Fowler said: "This application is made by the executor of decedent's estate to vacate an order fixing tax heretofore entered upon the report of an appraiser, and to declare the estate exempt from taxation.

"The decedent died on November 26, 1909, a resident of New York County. She was survived by her husband, but she left no descendants. Her will was duly admitted to probate by this court on the 17th of January, 1910, and letters testamentary were duly issued to her husband as executor. She bequeathed her entire estate to her husband. The appraiser designated to appraise her estate for the purpose of the transfer tax reported that the estate consisted of personal property amounting to \$263,509.47, and that it passed to the husband of decedent as sole beneficiary and legatee in accordance with the provisions of her will. An order assessing a tax upon the interest of the husband as sole legatee was duly entered upon the report. The husband, who is also the executor, now contends that he took title to the property by virtue of his marital rights and not under the will of the decedent, and that the estate of the decedent, therefore, is not subject to a transfer tax.

"The rule of the common law which authorized a husband to take the personal property of his deceased wife by virtue of his

marital rights has not, in so far as it applies to the case of a married woman dying intestate and without descendants, been changed by the various enabling statutes in relation to married women (*Robbins v. McClure*, 100 N. Y. 328). Therefore, when a woman dies intestate leaving a husband and no descendants her husband is entitled to her personal property *jure mariti* (*Matter of Russell*, 168 N. Y. 178; *Barnes v. Underwood*, 47 N. Y. 351). The property to which a husband thus becomes entitled is not subject to a transfer tax (*Matter of Green*, 144 App. Div. 232). Therefore, if the decedent herein had died intestate no transfer tax could be imposed upon the personal property of which she died possessed. But she made a will by which she disposed of all her personal property, and this will was duly probated by this court. If the husband's title to the property was acquired by virtue of the provisions of decedent's will, then the property is subject to a transfer tax (subd. 1, § 220, of the Tax Law). He had no title to the property during the life of his wife because she was the sole owner of it (§ 50, Domestic Relations Law). The only right in regard to her personal property which he acquired by virtue of his marriage was a right to the possession of so much of it as she did not dispose of during her life or by a valid testamentary instrument, provided she left no descendants (*Vallance v. Bausch*, 28 Barb. 633; *Burke v. Valentine*, 52 Barb. 422). But as the decedent disposed of all her personal property by a valid testamentary instrument, the husband did not become entitled to any of it *jure mariti*. The fact that the decedent bequeathed all her personal property to her husband does not detract from the force of this conclusion, because by bequeathing it to him she effectually disposed of all her personal property and thus prevented the accrual of his right to any of it *jure mariti*. As he did not acquire title to the property by virtue of his marital rights, but under and in accordance with the provisions of decedent's will, the transfer of the property is taxable. It would appear, therefore, that the order fixing tax should be affirmed."

ILLEGITIMATE DESCENDANTS

Are not "lineal descendants." *Matter of Beach*, 154 N. Y. 242-248.

Children of a decedent's illegitimate daughter who themselves were born in lawful wedlock are not "lineal descendants." *Matter of Roebuck*, 79 Misc. 589.

INACTIVE SECURITIES

Vide *MATTER OF CHAMBERS*, N. Y. Law Journal, January 31, 1912, opinion quoted sub *Closely Held Stock*, *supra*, page 612. Etiam *MATTER OF KENNEDY*, N. Y. Law Journal, March 8, 1911, *supra*, page 114.

INCOMPETENT

Vide *Special Guardian*.

INCREASE

Increase in value of decedent's property after death, or interest accruing thereafter not property of which decedent died seized or possessed. *Matter of Vassar*, 127 N. Y. 1-8; *Matter of Davis*, 149 N. Y. 539-547. Vide §§ 2712 and 2720 of Code of Civil Procedure.

As to allowance of commissions vide *Matter of Van Pelt*, 63 Misc. 617, *supra*, page 127.

INDUSTRIAL STOCK

Vide *Closely Held Stock* as to stock not customarily bought and sold on the market. For active stock vide *Schedule A*⁴ *supra*, page 112; comparatively inactive stock, page 627.

IN EXTREMIS

Vide *Contemplation of Death*; etiam *supra*, page 35.

INFANT

Vide *Special Guardian*.

INFIRMARY CORPORATIONS

Exempt under the provisions of the first sentence of § 221, *supra*, page 40. Vide cases cited sub *Exemptions*.

INSURANCE

Vide *Life Insurance Policy*.

INTANGIBLE PROPERTY

In *RESIDENT* estate the transfer of "any intangible" property is subject to tax. § 220; *Matter of Dusenberry*, 2 State Department Reports, 501, opinion quoted, *supra*, page 119.

In NON-RESIDENT estate intangible property is not subject to tax. For definition vide *supra*, page 134.

INTENT

Vide Evasion of Tax. As to motive of testator it was said in *Matter of Gould*, 156 N. Y. 423-428: "It matters not what the motive of a transfer by will may be, whether to pay a debt, discharge some moral obligation, or to benefit a relative for whom the testator entertains a strong affection, if the devise or bequest be accepted by the beneficiary,¹ the transfer is made by will, and the state by the statute in question makes a tax to impinge upon that performance." Vide etiam *Matter of Rogers*, 71 App. Div. 461-465, affirmed, on opinion below, 172 N. Y. 617; *Matter of Riemann*, 42 Misc. 648-650; *Matter of Edson*, 38 App. Div. 19, affirmed, on opinion below, 159 N. Y. 568. Etiam *Matter of Kidd*, 188 N. Y. 274.

For discussion of transfers by deed for a consideration vide *supra*, page 37.

INTEREST

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| (1) Discount allowed for early payment. | (6) Opinion of comptroller. |
| (2) Reduction of penalty. | (7) Interest not allowed on refund under § 225. |
| (3) Petition to remit penalty. | (8) Accrued interest to death of decedent taxable. |
| (4) Order remitting penalty. | |
| (5) Interest payable by comptroller under § 241. | |

(1) Discount allowed for early payment

Section 223 provides that if the tax "is paid within six months from the accrual thereof, a discount of five per centum shall be allowed and deducted therefrom."

COUNTY TREASURER is the one to whom tax must be paid, except that payment should be made to state comptroller in the seventeen counties of Albany, Bronx, Dutchess, Erie, Kings, Monroe, Nassau, New York, Niagara, Oneida, Onondaga, Orange, Queens, Rensselaer, Richmond, Suffolk and Westchester. Sections 223 and 229; *People ex rel. Lown v. Cook*, 158 App. Div. 78, affirmed, 209 N. Y. mem.

WHERE TAX ACCRUES AT DEATH OF LIFE TENANT interest is charged not from date of death of testator creating the estate but from date of death of life tenant. *Matter of Davis*, 149 N. Y. 539-549. Vide *Remainders*, *post*, page 817.

¹ As to renunciation of legacy vide cases cited sub Election.

(2) Reduction of penalty

If the "tax is not paid within eighteen months from the accrual thereof, interest shall be charged and collected thereon at the rate of ten per centum per annum from the time the tax accrued; unless by reason of claims made upon the estate, necessary litigation or other unavoidable cause of delay, such tax cannot be determined and paid as herein provided, in which case interest at the rate of six per centum per annum shall be charged upon such tax from the accrual thereof until the cause of such delay is removed, after which ten per centum shall be charged." Section 223.

The transfer tax appraiser is not the one to whom should be addressed an application under § 223 to reduce the rate of interest from ten to six per centum per annum. The appraiser has no power to act in the matter. The application should be made to the surrogate upon notice to the state comptroller. *Matter of Read*, 204 N. Y. 672; *Matter of Cornell*, 170 id. 423; *Matter of Skinner*, 106 App. Div. 217-218; *Matter of Wormser*, 51 App. Div. 441-445; *Matter of Bolton*, 35 Misc. 688; *Matter of Stewart*, 131 N. Y. 274-285.

"AN APPLICATION TO REMIT PENALTY can only be made to the court upon motion and is not to be the subject of an appeal from the decree fixing the tax. The decree does not concern itself with the amount of interest or penalty. If the penalty is to be remitted a special application showing grounds therefor within the statute must be made to the surrogate." *Matter of De Graaf*, 24 Misc. 147-150.

APPLICATION DENIED in *Matter of Brower*, N. Y. Law Journal, July 15, 1913, Surrogate Cohalan saying: "The order fixing tax was entered before the expiration of the eighteen months within which the tax could be paid without penalty, and as the executrix failed to take advantage of this fact the application is denied."

Until chap. 713, Laws of 1887, in effect June 25, 1887, interest on the tax was charged from the date of accrual if not paid within the statutory period although the delay in payment caused by necessary litigation. *Matter of Stewart*, 131 N. Y. 274.

As to 1885 statute, vide *People v. Prout*, 53 Hun, 541, affirmed without opinion, 117 N. Y. 650.

Under chap. 713, Laws of 1887, and until amendment by chap. 399, Laws of 1892, in effect May 1, 1892, interest ran not

from the date of death but eighteen months subsequent thereto provided delay caused by necessary litigation or other unavoidable cause of delay. Matter of Fayerweather, 143 N. Y. 114.

(3) Petition to remit penalty

The allegations necessary to bring the petition within the terms of § 223 vary with the circumstances of each case. The following petition, which was granted, is a good illustration of the proper method of placing the facts before the court.

SURROGATES' COURT, COUNTY OF NEW YORK.

In the Matter of the Transfer Tax
upon the Estate of
GRACE MARGUERITE COUDERT,
Deceased.

*Petition to Remit Penalty under
§ 223.*

To the Surrogates' Court of the County of New York:

The petition of John V. Bouvier, Jr., as executor of the last will and testament of the above named Grace Marguerite Coudert, respectfully shows and alleges as follows:

Said decedent was a resident of the County of New York and died in France on the fifth day of June, 1909, leaving a last will which was admitted to probate by this court on the 25th day of February, 1911, and letters testamentary thereon were granted to the petitioner on the fourth day of March, 1911.

The transfer tax upon all the interests in the estate of said decedent has been assessed at the sum of \$773.43 by an order made herein on the 15th day of July, 1913.

On June 19, 1912, the petitioner paid the Comptroller of the State of New York the sum of \$850 on account of said tax and interest and received a temporary receipt therefor in the usual form.

The delay in the determination and payment of said tax was due to claims made upon the estate, necessary litigation and other unavoidable causes. The proceedings for the probate of the will were begun promptly, the petition for the probate having been filed in this court on the 24th day of June, 1909, but as before stated the will was not admitted to probate until February 25, 1911. This delay was caused by a contest of the will by some of the heirs-at-law and next of kin of the testatrix, to wit, her sisters Aimée Coudert Brenning and Clarisse Coudert Nast. After the entry of the decree admitting the will to probate, one of said contestants, Aimée Coudert Brenning, appealed therefrom to the Appellate Division of the Supreme Court for the First Judicial Department, and printed and served the record of such appeal. Said appeal was finally withdrawn, but not until the 24th day of July, 1911, or later.

An action was also brought against this petitioner by said Clarisse Coudert Nast to recover a claim for moneys alleged to have been advanced by her to said decedent and the petitioner was obliged to compel the claimant to make proof of said claim and to litigate the same. Said claim was not proved in whole, but a judgment for \$2,250 and interest was finally recovered against this petitioner as such executor and was entered in the office of the Clerk of the County of New York on November 30, 1912.

The petitioner was also in doubt as to the value and collectibility of a note for \$4,000, forming part of the estate, and did not recover and collect the same until May 28, 1912.

By reason of the foregoing causes and the necessary delays incidental thereto, said tax could not be fixed until long after said 19th day of June, 1912 and the petitioner could not pay said tax before that day, and he therefore prays that an order be made remitting the penalty upon said tax from ten per centum per annum to six per centum per annum from said fifth day of June, 1909, the date of the death of the decedent, to said 19th day of June, 1912, and that he may have such other and further relief as may be just. JOHN V. BOUVIER, JR.

County of New York, ss:

John V. Bouvier, Jr., being duly sworn, says that he is the petitioner above named, that the foregoing petition is true to his knowledge, except as to the matters therein stated to be alleged on information and belief and that as to those matters he believes it to be true.

Sworn to before me this }
21st day of July, 1913. } JOHN V. BOUVIER, JR.

Edward F. Lindsay,
Commissioner of Deeds,
New York City.

(4) Order remitting penalty

At a Special Term of the Surrogates' Court, held in and for the County of New York in the Borough of Manhattan, on the 4th day of August, 1913.

Present: HON. JOHN P. COHALAN, *Surrogate*.

In the Matter of the Appraisal
under the Transfer Tax Law of
the Estate of
WILLIAM B. PETTIT,
Deceased.

Order Remitting Penalty.

The motion made on behalf of Stephen O. Lockwood, as Executor of William B. Pettit, deceased, to reduce the interest on the unpaid

transfer tax assessed on the estate of William B. Pettit from ten per centum per annum to six per centum per annum, coming on to be heard, now on reading and filing the affidavit of Stephen O. Lockwood, verified July 17th, 1913, and the notice of motion with due proof of service thereof on Thomas E. Rush, Esq., attorney for the State Comptroller appearing and not opposing, it is

ORDERED AND ADJUDGED, that the penalty of ten per cent upon said tax be remitted, and that interest be charged thereon at the rate of six per cent from the date of accrual of said tax, to wit, the 17th day of March, 1910, the date of death of said decedent, to the date of payment thereof, provided that payment be made within thirty days after the entry of this order.

JOHN P. COHALAN,
Surrogate.

(5) Interest payable by comptroller under § 241

Section 241 was amended by Laws 1911, chap. 800, in effect July 28, 1911, by adding thereto its present last two paragraphs. The first sentence of this amendment to § 241 reads:

"Whenever the tax on a contingent remainder has been determined at the highest rate which on the happening of any of said contingencies or conditions would be possible under the provisions of this article, the state comptroller, in the counties wherein this tax is payable direct to him, and in all other counties the treasurer of said counties, respectively, when such tax is paid shall retain and hold to the credit of said estate so much of the tax assessed upon such contingent remainders as represents the difference between the tax at the highest rate and the tax upon such remainders which would be due if the contingencies or conditions had happened at the date of the appraisal of said estate, and the state comptroller or the county treasurer shall deposit the amount of tax so retained in some solvent trust company or trust companies or savings banks in this state, to the credit of such estate, paying the interest thereon when collected by him to the executor or trustee of said estate, to be applied by said executor or trustee as provided by the decedent's will."

(6) Opinion of comptroller

In Matter of Billingsley, 1 State Department Reports, 569, the state comptroller in an opinion, dated February 14, 1913, said: "The department is of the opinion that the amendment to § 241 of the Transfer Tax Law by chapter 800 of the Laws of 1911, requires the taxing order in estates where the tax is imposed at the highest rate on which there is any possibility of certain remainders vesting, to be entered in a different manner from that in which the orders in such cases have been hereto-

fore entered. You will also note that § 230 of the Tax Law was amended by chapter 800 of the Laws of 1911 in respect to the entering of an order where the tax was to be imposed at the highest rate, such amendment providing for the entry of a temporary order only. The amendment to § 241 provides that whenever the tax on a contingent remainder has been determined at the highest rate, that when such tax is paid, the comptroller shall hold, to the credit of said estate, so much of the tax assessed upon such contingent remainders as represents the difference between the tax at the highest rate and the tax on such remainders which would be due if the contingencies or conditions had happened at the date of the appraisal of said estate. This amendment further provides that the executors or trustees may elect to assign to and deposit with the state comptroller bonds or other securities, to be approved by the comptroller, for the purpose of securing the payment of the difference between the tax on such remainders at the highest rate and the tax on such remainders which would be due if the contingencies or conditions had happened at the date of the appraisal of the estate.

“This provision necessarily implies that the temporary taxing order must first determine the amount of tax which would be due if the remainders had actually become vested on the date of the appraisal and must also determine the amount of tax due by reason of extending the tax at the highest rate on which there is any possibility of such remainders vesting. Otherwise there is nothing in the taxing order to show the comptroller the amount that is to be turned into the state treasury or the amount that is to be retained by him until the ultimate devolution of the property.” *

Vide etiam the two opinions of the state comptroller, dated respectively February 10, and February 11, 1913, published in 1 State Department Reports, 566-567; and opinions, dated respectively May 19, 1913, and June 5, 1913, published in advance sheets of said State Department Reports. Vide Remainders, *post*, page 824.

(7) Interest not allowed on refund under § 225

A refund made under the provisions of § 225 does not carry interest since the amendment of § 225 by Laws 1907, chap. 323.

Prior to 1907 amendment interest was paid upon the amount of tax refunded. Matter of O'Berry, 179 N. Y. 285.

(8) Accrued interest to death of decedent taxable

Matter of Vassar, 127 N. Y. 1-8; Matter of Hewitt, 181 id. 547, *supra*, page 301.

INTERLOCUTORY ORDER

Interlocutory order is not appealable. Matter of Browne, 195 N. Y. 522, and cases cited sub Appeal. Vide etiam Matter of Astor, 137 App. Div. 922, *supra*, page 107.

Temporary order should be entered where a tax has been imposed at the "highest rate" in pursuance of the provisions of the sixth paragraph of § 230 as amended by Laws 1911, chap. 800, in effect July 28, 1911. Vide opinions of state comptroller cited sub Interest and sub Remainders.

INTERPRETATION OF STATUTE

Vide Doubt; Legislative Declaration.

INTERSTATE CORPORATION

Vide Apportionment of Property.

INTER VIVOS GIFT

Vide Contemplation of Death; Gift; Trust Deed.

INTESTATE LAWS

Vide Decedent Estate Law *supra*, page 548. For discussion vide *supra*, page 36.

INVALID

Failure of appraiser to give notice as required by the first sentence of the second paragraph of § 230 invalidates proceeding. Matter of McPherson, 104 N. Y. 306-321; Matter of Wolfe, 137 N. Y. 205-213; Matter of Winters, 21 Misc. 552-555; Matter of Backhouse, 110 App. Div. 737-739, affirmed, without opinion, 185 N. Y. 544.

As to transfers made by an invalid, vide Matter of Dee, N. Y. Law Journal, December 6, 1913, opinion quoted, *supra*, page 645, and other cases cited sub Contemplation of Death.

JEWELRY

Should be set forth in Schedule A³, and appraisal by expert should be furnished, vide *supra*, page 108.

JOINT-STOCK ASSOCIATION

Stock of a joint-stock association held by resident decedent is subject to the tax.

NON-RESIDENT ESTATE is not subject to tax on stock or any other intangible property, subd. 2 of § 220 and § 243. If the transfer in a non-resident estate was made prior to the amendment by Laws 1911, chap. 732, in effect July 21, 1911, then stock of a joint-stock company held by a non-resident decedent is taxable only in the proportion which the assets of the company in this state bear to the entire assets of the company. *Matter of Willmer*, 75 Misc. 62, affirmed, 153 App. Div. 804. Shares in the "The New York Times," a joint-stock association owning real estate, held to be personal property. *Matter of Jones*, 172 N. Y. 575.

JOINT TENANCY

As to joint ownership of personal property vide *Matter of Von Bernuth*, N. Y. Law Journal, March 1, 1913, opinion quoted, *post*, page 791; *Matter of Heiser*, id., July 19, 1913, opinion quoted, *post*, page 804; *Matter of Pitou*, 79 Misc. 384, and other cases cited sub Property Held in Trust or Jointly, *post*, page 787.

As to joint tenancy of real property vide *post*, page 788.

JUDICIAL CAPACITY OF TAXING OFFICER

Vide cases cited sub Appraiser; etiam *Matter of Ullmann*, 137 N. Y. 403-407, *supra*, page 181; *Amherst College v. Ritch*, 151 N. Y. 282-343; *Matter of Costello*, 189 N. Y. 288-291.

JUDICIAL NOTICE

The court will not take judicial notice of the statutes and decisions of other states. *Matter of Cummings*, 142 App. Div. 377-391. Vide Laws of Another State or Country.

JURE MARITI

Vide Husband.

JURISDICTION

Vide Appeal; Appraiser; Mandamus; Notice of Appraisal; Reappraisal; Supreme Court; Surrogate; Vacating Decree.

As to jurisdiction of surrogate in RESIDENT estate, vide page 56; in NON-RESIDENT, page 137.

Jurisdiction of court of another state may be attacked. *Tilt v. Kelsey*, 207 U. S. 43-59, *supra*, page 311; *Matter of Lawrence*, N. Y. Law Journal, February 15, 1913, opinion quoted *supra*, page 317; *Matter of Cummings*, 142 App. Div. 377.

KENNEDY CASE, RULE IN

Matter of John S. Kennedy, N. Y. Law Journal, March 8, 1911, *supra*, page 114. Vide etiam *Matter of Chambers*, *id.*, January 31, 1912, *supra*, page 627.

LACHES

Where none, not estopped from exercising election not to take under will. *Matter of Mather*, 90 App. Div. 382-385, affirmed, without opinion, 179 N. Y. 526. Vide Statute of Limitations.

A decree of the surrogate's court will not be opened where there has been laches on the part of the petitioner. *Matter of Daly*, 34 Misc. 148-153. Vide cases cited sub *Vacating Decree*.

LAPSED LEGACY

Should be pointed out in Schedule D, page 94. *Morgan v. Cowie*, 49 App. Div. 612-615.

LARGE BLOCK OF STOCK

Vide *Matter of Curtice*, 185 N. Y. 543, *supra*, page 325; etiam page 115.

LAWS OF ANOTHER STATE OR COUNTRY

Japanese law as to real property put in evidence by certificate of Japanese barrister. *Matter of Vivanti*, 206 N. Y. 656, *supra*, page 388. Vide § 942 of Code of Civil Procedure.

New Jersey law introduced in evidence by affidavit of New Jersey lawyer. *Tilt v. Kelsey*, 207 U. S. 43, *supra*, page 316.

ABSENCE OF PROOF. In *Matter of Lawrence*, N. Y. Law Journal, February 15, 1913, Surrogate Fowler held: "As the decedent was a resident of Connecticut, the question whether he made a valid gift of the bonds to the persons claiming them should be determined by the law of Connecticut. No proof of that law was adduced before the appraiser, and in the absence of such proof it will be presumed by this court that the common law of Connecticut is the same as our law (*First Nat. Bank v.*

Nat. Broadway Bank, 156 N. Y. 459; *Electro-Tint Eng. Co. v. Amer. Handkerchief Co.*, 130 App. Div. 564).

Surrogate Fitzgerald in *Matter of Kennedy*, 20 Misc. 531, refused to consider in NON-RESIDENT'S ESTATE claim for deduction of executor's commissions in Pennsylvania which were larger than allowed in New York, for the reason that the Pennsylvania law had not been proved on the subject.

As to validity and effect of TESTAMENTARY DISPOSITIONS OF NON-RESIDENT vide § 47 of Decedent Estate Law, *supra*, page 547; *Matter of Turner*, 82 Misc. 25-28.

EXEMPLIFIED COPIES. Representative of estate invoked the full faith and credit clause of the Constitution of the United States (Art. 4, § 1) "upon bare allegations of conclusions upon information and belief. The least that this respondent could have done was to annex to its papers exemplified copies of the proceedings and decrees for which faith and credit were claimed; and until such proof was made it was not incumbent upon the State Comptroller either to attack the jurisdiction of the California court or to prove the California law." *Matter of Cummings*, 142 App. Div. 377-386.

JURISDICTION of court of another state may be attacked. *Tilt v. Kelsey*, 207 U. S. 43-59; *Matter of Lawrence*, N. Y. Law Journal, February 15, 1913, opinion quoted *supra*, page 317; *Matter of Cummings*, 142 App. Div. 377-390.

LEASEHOLD

As to rents vide subdivision 7 of § 2712 of Code of Civil Procedure, and also § 2720; *Jay v. Kirkpatrick*, 26 Misc. 550-551.

Unexpired lease, vide Schedule B³, page 132.

Perpetual lease, reserving rent, real property. *Matter of Vivanti*, 206 N. Y. 656, *supra*, page 387.

Lease for twenty-one years from Columbia College of real estate in New York held to be personal property under subdivision 1 of § 2712 of Code of Civil Procedure. *Matter of Althause*, 63 App. Div. 252, affirmed, without opinion, 168 N. Y. 670.

NON-RESIDENT, who died January 17, 1898, at the time of his death was the lessee of certain premises in the County of New York. An application was made to declare estate exempt, and in denying the application Surrogate Cohalan, in *MATTER OF JOHN H. ROSENBAUM*, N. Y. Law Journal, August 7, 1913, said:

"The lease was for a term of twenty-one years, with the privilege of renewal. The written instrument of lease was in New Jersey at the time of decedent's death, and as this was the only property of which the decedent died seized or possessed in the State of New York the executor contends that the estate is exempt from taxation. Section 242 of chapter 908 of the Laws of 1896 defines the words 'estate' and 'property' as used in the Transfer Tax Law as the 'property or interest therein of the testator passing to those not specifically exempt.' Therefore the decedent's right to the use and occupation of the leasehold premises was an interest in property located here.

"The fact that the instrument of lease was located in New Jersey is immaterial, as it was merely evidence of the decedent's interest in the premises situate in this county. A lease is not an indebtedness existing in favor of either of the parties thereto, but evidence of a contract or agreement by which each of the parties became entitled to certain rights. Like a certificate of stock in a corporation, it has no legal situs apart from the property to which it refers. The decedent's interest in the leasehold premises therefore constituted property in this State (Matter of Whiting, 150 N. Y. 27; Matter of Clinch, 180 N. Y. 300)."

A transfer made since the 1911 amendment to subdivision 2 of § 220 of intangible property of NON-RESIDENT is not taxable. For definition of intangible property vide § 243 and Matter of Dusenberry, 2 State Department Reports, 501, opinion quoted *supra*, page 119.

LEGACY

Vide Residuary Estate.

ASSIGNMENT of to avoid contest taxable as though assignment not made. Matter of Cook, 187 N. Y. 253.

LEGATEE MAY RENOUNCE the gift and refuse to receive it, and no tax can be collected with respect to him because there has been no transfer to him. Matter of Wolfe, 179 N. Y. 599, *supra*, page 297.

MAY RENOUNCE A LEGACY IN PART. Matter of Merritt, 155 App. Div. 228-232.

As to property in NON-RESIDENT estate not specifically bequeathed, vide *supra*, page 152.

CANCELLATION BY WILL OF NOTES is a taxable transfer, Matter of Wood, 40 Misc. 155, unless maker of note is insolvent.

Morgan v. Warner, 45 App. Div. 424-427, affirmed, on opinion below, 162 N. Y. 612.

FORGIVING DEBT taxable unless debtor insolvent. *Matter of Manning*, 169 N. Y. 449.

As to JUDGMENT against heir. *Matter of Smith*, 14 Misc. 169-171.

LAPSED LEGACIES should be pointed out in Schedule D, page 94. *Morgan v. Cowie*, 49 App. Div. 612-615.

LEGACY TO UNITED STATES government is taxable. *Matter of Merriam*, 141 N. Y. 479, sustained in 163 U. S. 625, sub nom. *United States v. Perkins*.

LEGACY TO PAY DEBTS taxable if creditor accepts the legacy in payment of debt. *Matter of Jay Gould*, 156 N. Y. 423, *supra*, page 224; *Matter of Rogers*, 71 App. Div. 461-465, affirmed, on opinion below, 172 N. Y. 617.

EXTRINSIC EVIDENCE IMPRESSING LEGACY WITH TRUST does not relieve from tax against legatee, the equitable rights arising not under the will, but from facts appearing extrinsic thereto. *Matter of Edson*, 159 N. Y. 568, *supra*, page 230.

PAYMENT OF TAX

The will provided that the legacies were to be paid "without any rebate or deduction whatever." This was held not to mean that the inheritance tax should be paid from the residuary estate. The executor should, under § 224, pay the tax and deduct the amount thereof from the legacy. *Jackson v. Tailer*, 184 N. Y. 603, *supra*, page 322.

Surrogate McCauley, Rockland County, in *Matter of Smith*, 80 Misc. 140-143, says: "That the testator had the right to direct how or from what fund all succession or transfer taxes should be paid cannot be questioned. *Matter of Gihon*, 169 N. Y. 443, 62 N. E. 561; *Isham v. New York Ass'n for Poor*, 177 N. Y. 218, 69 N. E. 367. The direction of the testator, as expressed in the first clause of his will, is:

"That all the gifts, bequests, devises and legacies hereinafter mentioned be paid, transferred or received in full (subject to any provisions for abatement hereinafter contained), and that all succession or transfer taxes imposed thereon, or on any of them, be paid out of my residuary estate."

"This language is comprehensive, apt, and expressive, and, as it seems to me, admits of but one interpretation, namely, that the testator's intention was that all persons who take, whether immediately and directly under his will, or by the exercise of

the power of appointment, should receive the gift or bequest without diminution through the imposition upon the transfer of any federal or state tax."

In TRUST ESTATE the tax is paid out of corpus not out of income. Matter of Tracy, 179 N. Y. 501, and cases cited sub Payment of Tax.

"WHERE A LEGACY IS GIVEN FOR A SPECIFIED AMOUNT the tax must be deducted from the amount of the legacy and the balance only given to the legatee." Matter of Gihon, 169 N. Y. 443-447.

Non-resident

Prior to amendment by chap. 732, Laws 1911, *supra*, page 526, in effect July 21, 1911, of subdivision 2 of § 220 and § 243, the Court of Appeals passed upon the question of the interest of non-resident decedent in estate of another decedent in Matter of Phipps, 143 N. Y. 641 (1894), *supra*, page 190; Matter of Zefita, 167 N. Y. 280 (1901), *supra*, page 251; Matter of Clinch, 180 N. Y. 300 (1904), *supra*, page 300; and Matter of Lord, 186 N. Y. 549 (1906), *supra*, page 332, the Lord case being sustained in 211 U. S. 477, sub nom. Beers *v.* Glynn.

IN MATTER OF ARMSTRONG, N. Y. Law Journal, February 20, 1912, Surrogate Fowler said: "This is an appeal by the State Comptroller from an order fixing tax. The decedent was a resident of Connecticut and died on the 27th day of June, 1910. At the time of his death he was entitled to a one-third interest in the estate of his father, Lorenzo Armstrong. The latter was also a resident of Connecticut. At the time of the decedent's death his father's estate had not been distributed, but a decree of distribution was entered by the Probate Court of New Haven on 29th of October, 1910, and the executors of decedent's estate then received from the executors of the estate of Lorenzo Armstrong certain stocks in New York corporations. Such stocks then became a part of decedent's estate, and as these facts were alleged in the affidavits submitted to the appraiser before the filing of his report he should have included in the taxable assets of decedent's estate the stocks of New York corporations which had been delivered to the executors of decedent's estate by the executors of the estate of Lorenzo Armstrong (Matter of Clinch, 180 N. Y. 300)."

LEGISLATIVE DECLARATION

Amendment incorporating new matter is entitled to consider-

ation at the hands of the court, "as a legislative declaration that the subject-matter of the new provision did not prior thereto constitute a part of the law." Matter of Harbeck, 161 N. Y. 211-217; Matter of Miller, 110 id. 216-222; Matter of Enston, 113 id. 174-183.

Legislature may specifically declare that property "heretofore devised or bequeathed" shall be exempt. Church of the Transfiguration v. Niles, 86 Hun, 221-222. Vide cases cited sub Doubt; Retroactive.

LETTERS

Issuance of letters not necessary to confer jurisdiction. Section 228; Matter of Edgerton, 35 App. Div. 125-126, affirmed, without opinion, 158 N. Y. 671; Matter of Fitch, 160 N. Y. 87-91; 2 State Department Reports, 497-500.

As to JURISDICTION IN RESIDENT ESTATE, vide page 56. In non-resident estate, page 137.

LIBRARY

Corporation or association, wherever incorporated or located, organized exclusively for library purposes not subject to tax upon bequests of personal property other than money or securities. Second sentence of § 221. Matter of Francis, 121 App. Div. 129, affirmed, on opinion below, 189 N. Y. 554; Matter of Saunders, 77 Misc. 54-62, affirmed, without opinion, 156 App. Div. 891.

LEGACY TO PURCHASE BOOKS for Forman Library of Olean was held to be exempt by Surrogate Davie of Cattaraugus County in Matter of Higgins, 55 Misc. 175.

LIEN OF TAX

The statute by § 224 provides that "every such tax shall be and remain a lien upon the property transferred until paid and the person to whom the property is so transferred, and the executors, administrators and trustees of every estate so transferred shall be personally liable for such tax until its payment."

The above provision of § 224 should be read in connection with § 245 which declares, *inter alia*: "provided, however, that as to real estate in the hands of *bona fide* purchasers, the transfer tax shall be presumed to be paid and cease to be a lien as against such purchasers after the expiration of six years from the

date of accrual." Vide *Matter of Strail*, 195 N. Y. 575, *supra*, page 368.

Section 245 is retroactive. *Matter of Strang*, 117 App. Div. 796; *Matter of Moench*, 39 Misc. 480.

PURCHASER COMPELLED TO TAKE TITLE in *Brown v. Lawrence Park Realty Co.*, 133 App. Div. 753. The case was tried upon an agreed statement of facts under the provisions of § 1279 of the Code of Civil Procedure. The executors had entered into a contract to sell certain of the real estate of decedent, and the court held, page 756: "That neither the whole nor any part of the transfer tax which the law imposed upon the various legatees under the will of plaintiff's testator was a lien upon the real property contracted to be sold, and that defendant was not justified in rejecting title on the sole ground that such transfer tax was a lien thereon."

MOTION TO COMPEL PURCHASER TO TAKE TITLE denied by Justice Beekman at New York Special Term on ground that transfer tax had not been fixed on estate of person who died seized of the premises. "The tax belongs to the state, and the lien which is given to the state to secure its collection is emphatically and in terms declared by the statute to be one that shall continue until the tax is paid." *Kitching v. Shear*, 26 Misc. 436-439.

IN REAL ESTATE TRANSACTIONS it is the practice to insist upon transfer tax proceedings. The certificate of the state comptroller under the last paragraph of § 236 should be obtained and recorded so as to avoid any future question as to payment of tax.

Vide **MATTER OF MEYER**, 209 N. Y. 386, *supra*, page 397, for discussion of § 236.

POWER OF EXECUTOR TO SELL REAL ESTATE to satisfy lien of tax discussed in opinion of state comptroller quoted sub Real Estate.

IN NON-RESIDENT ESTATE it was held that the state had a lien on the property within the state. *Matter of Pullman*, 46 App. Div. 574-577.

LEGATEE not liable personally beyond the amount of the property coming into his hands. *Matter of Bushnell*, 73 App. Div. 325-328, affirmed, without opinion, 172 N. Y. 649, *supra*, page 275.

Where a legatee does not accept a legacy in full the transfer tax is a lien so far as the legatee is concerned; against only that

portion of the legacy not renounced. *Matter of Merritt*, 155 App. Div. 228-232.

LIFE ESTATE

Vide Annuities; Gift; Payment of Tax; Power of Appointment; Remainders; Trust Deed.

Value of life estate to be computed upon 5% basis by Superintendent of Insurance under § 230. *Matter of Potter*, 199 N. Y. 561, *supra*, page 371.

As to TABLES used by Superintendent of Insurance vide page 581.

Taxable although life tenant dies before probate of will. *Matter of White*, 208 N. Y. 64, *supra*, page 390.

Life estate of life tenant dying before appraisal is not to be calculated on actual duration, but on theoretical valuation by Superintendent of Life Insurance. *Matter of Jones*, 28 Misc. 356, affirmed, 172 N. Y. 575. Vide *Matter of Hall*, 36 Misc. 618, discussed *supra*, page 586.

As to estate of a decedent entitled to a vested interest in the estate of another decedent, subject to the life interest of a life tenant, vide *Matter of Huber*, 86 App. Div. 458-463. Such interest should be set forth in Schedule A⁶ *supra*, page 121.

As to taxation of life estate subject to annuities vide *Matter of Maresi*, 74 App. Div. 76. The *Maresi* case also interprets and applies the provisions of the fifth paragraph of § 230.

LIFE INSURANCE

In resident estates the life insurance policies payable to the estate of decedent should be set forth in Schedule A³ *supra*, page 110.

Life insurance policies payable to estate of resident decedent are subject to transfer tax; immaterial whether taxable under general tax law. *Matter of Knoedler*, 140 N. Y. 377.

Decedent, a resident, had a life insurance policy on his life payable to his executors, administrators or assigns, "for the express benefit of his wife, and surviving children." The amount of the policy, together with certain dividends and accruments thereon, was collected by and paid to the executrices. Surrogate Millard, Westchester County, said: "It seems to me that the language of the policy simply designates the executors, administrators or assigns as some one to whom the payment can be

made, but it is clearly not for them to say what shall be done with it but they are the medium only to pass the money to the widow and children, who are alone entitled to its proceeds. * * *

"This policy, to my mind, is merely a contract between the decedent and the company for the benefit of his wife and children and no one else is or can be interested therein and the same does not pass by reason of the provisions of this will but by reason of the clause in the policy itself, and I, therefore, reverse the ruling of the appraiser holding that the proceeds of this policy are taxable." *Matter of Elting*, 78 Misc. 692.

Decedent had life insurance policies payable to his estate. At his death they were found in his safe deposit box. Attached to each policy was a duplicate assignment of it to his wife if she survived him, otherwise to his estate. One policy was payable to the assured if he lived twenty years, and in the assignment he reserved the cash payment if he lived for that period. The duplicate original assignments were filed with the insurance company, who paid the amount of the policies to the wife. The Comptroller contended a tax was due on the theory that the assignments were to take effect in possession and enjoyment at the death of the decedent. Held, not taxable, the court saying: "The statutes of this state favor and encourage insurance for the benefit of a wife, and the state is at a disadvantage when it seeks to tax such a provision for her when the company and all others recognize her right to the benefit intended." *Matter of Parsons*, 117 App. Div. 321-323.

GRATUITY FUND of New York. Produce Exchange in which decedent had interest held not subject to tax. *Matter of Fay*, 25 Misc. 468.

Non-resident

In non-resident's estate the proceeds of life insurance policies are not subject to tax. Subdivision 2 of §§ 220 and 243. Prior to the amendment by Laws of 1911, chap. 732, *supra*, page 526, the courts passed on the questions in the cases indicated below.

Life insurance in New York company on life of NON-RESIDENT not taxable where it is not necessary to resort to the courts of New York to enforce payment. *Matter of Gordon*, 186 N. Y. 471; *Matter of Rhoads*, 190 N. Y. 525; *vide etiam* *Matter of Abbott*, 29 Misc. 567; *Matter of Horn*, 39 Misc. 133; *Matter of Gibbs*, 60 Misc. 645.

LIMITATION OF TIME

"The provisions of the Code of Civil Procedure relative to the limitation of time of enforcing a civil remedy shall not apply to any proceeding or action taken to levy, appraise, assess, determine or enforce the collection of any tax or penalty prescribed by this article. * * *" Section 245. Vide Statute of Limitations.

As to REFUND under § 225 vide Matter of Hoople, 179 N. Y. 308, *supra*, page 290; Matter of Buckingham, 106 App. Div. 13-17; Matter of Von Post, 35 Misc. 367.

LINEAL DESCENDANTS

Entitled to exemption of five thousand dollars and the minimum rates of subdivision 1 of § 221a.

Transfers of personal property to lineals were first made taxable by chap. 215, Laws of 1891, in effect April 20, 1891, and it was not until March 16, 1903, that transfers of real property to lineals were made taxable by chap. 41, Laws of 1903. Real estate situated without the state is not subject to tax. Matter of Swift, 137 N. Y. 77.

Child of adopted child a lineal descendant of foster parent. Matter of Cook, 187 N. Y. 253.

In MATTER OF ROEBUCK, 79 Misc. 589, the question was raised as to whether the rate of taxation of legacies to children of the decedent's illegitimate daughter who themselves were born in lawful wedlock should be at one per cent or at five per cent. In deciding that the five per cent rate applied Surrogate Ketcham said: " 'A lineal descendant is one who is in the line of descent from a certain person.' But the line of descent is not merely derived from the communication of blood by animal generation. 'The line of descent is the course that property takes according to law when the owner dies.' Matter of Beach, 154 N. Y. 242; Matter of Cook, 187 N. Y. 253-261.

"These cases forbid the argument, made in behalf of the legatees, that the words 'lineal descendants' in the statute cited *supra* are not used in their legal and technical sense. Under these authorities there is no line of descent between the decedent and these legatees, and they cannot be his descendants."

LISTED SECURITIES

Vide page 112.

LITERARY CORPORATION OR ASSOCIATION

Entitled to exemptions under second sentence of § 221, *supra*, page 41.

LOCAL STOCKS

Vide Matter of Cook, 50 Misc. 487-493 (*supra*, page 338), affirmed, 187 N. Y. 253-262, and cases cited sub Closely Held Stock.

MANDAMUS

Mandamus issued compelling state comptroller to refund tax paid upon an order of the surrogate assessing tax, which order, the court held, was made without jurisdiction. Matter of Coogan, 162 N. Y. 613, *supra*, page 239.

Mandamus issued to compel surrogate to cause appraisal of an estate upon application of state comptroller. Kelsey v. Church, 112 App. Div. 408.

Motion denied for a peremptory writ of mandamus to compel state comptroller to appoint under § 234 transfer tax assistant recommended by surrogate. Duell v. Glynn, 191 N. Y. 357.

Application for writ of mandamus to compel state comptroller to issue final receipt refused upon the merits in People ex rel. Ripley v. Williams, 69 Misc. 402. Vide Payment of Tax, *post*, page 757.

MANUSCRIPTS

Vide § 221b, *supra*, page 43 as to when exempt.

Should be set forth in Schedule A ³ and appraisal by expert should be furnished, vide *supra*, page 107.

MARITAL RIGHTS

Vide Curtesy; Dower; Husband; Wife.

MARKET VALUE

Vide Cash Value; Closely Held Stock.

"There may be no 'market value' for the stock of private business corporations." Matter of Valentine, N. Y. Law Journal, December 4, 1913, *supra*, page 624. Etiam Matter of Brandreth, 28 Misc. 468-474, *supra*, page 255, affirmed 169 N. Y. 437.

MARRIAGE TERMINATING TRUST ESTATE

Matter of Sloane, 154 N. Y. 109-111; etiam fourth paragraph of § 230.

MARSHALLING OF ASSETS

For discussion of, in non-resident estates, vide *supra*, page 152.

MASONIC HALL AND ASYLUM FUND

Legacy to, held exempt under first sentence of § 221. Matter of Allen, 76 Misc. 88.

MASSES

In the McAvoy case, 112 App. Div. 377 (1906), it was held that a legacy to a pastor of a church for masses was not exempt. The statute was amended later by chap. 706, Laws of 1910, in effect July 11, 1910, by adding to the first sentence of § 221 the words "for religious ceremonies, observances or commemorative services of or for the deceased donor." The McAvoy case was held by the surrogate of Erie County not to apply where the legacies "were bequeathed directly to religious bodies." Matter of Didion, 54 Misc. 201.

METHOD OF PROCEDURE

Vide Procedure.

METROPOLITAN MUSEUM OF ART

Held to be an educational corporation and entitled to exemption under first sentence of § 221. Matter of Mergentime, 129 App. Div. 367, affirmed, on opinion below, 195 N. Y. 572. Vide cases cited sub Educational Corporation.

MISSIONARY CORPORATION

Exempt under first sentence of § 221. Matter of McCormick, 206 N. Y. 100. Vide cases cited sub Exemptions.

MOBILIA PERSONAM SEQUUNTUR

The maxim partially revived since amendment to § 220 by Laws 1911, chap. 732. Vide *supra*, page 135.

The following cases relate to transfers made prior to the 1911 amendment. Justice Holmes said in *Blackstone v. Miller*, 188 U. S. 189, which sustained Matter of Blackstone, 171 N. Y. 682: "We perceive no better reason for denying the right of New York to impose a succession tax on debts owed by its citizens than upon tangible chattels found within the state at the time of death. The maxim *mobilia sequuntur personam* has no

more truth in the one case than in the other. When logic and the policy of a State conflict with a fiction due to historical tradition, the fiction must give way." Vide etiam *Matter of Romaine*, 127 N. Y. 80-87; *Matter of Whiting*, 150 id. 27-30; *Matter of Clinch*, 180 id. 300; *Matter of Daly*, 100 App. Div. 373, affirmed, without opinion, 182 N. Y. 524; *Matter of Tiffany*, 143 App. Div. 327-330, affirmed, on opinion below, 202 N. Y. 550, appeal pending in U. S. Supreme Court.

In *RESIDENT ESTATES* maxim applicable even though it is not possible to collect tax. In case where resident died leaving personal property in Iowa and Iowa administrator paid the Iowa property to a resident of Iowa, tax assessed although it was held that New York administrators were not liable for tax under § 224. *Matter of Dingman*, 66 App. Div. 228.

Transfers made since the 1911 amendment of tangible property without the state are not subject to tax.

MODIFYING DECREE

Vide Vacating Decree.

MONEY

By the third sentence of § 243 as amended by Laws 1911, chap. 732, money is defined as "intangible property."

IN A *RESIDENT ESTATE* money is subject to tax wherever situated. Subdivision 1 of § 220.

In a *NON-RESIDENT ESTATE* money is not subject to tax even though within the state. Subdivision 2 of § 220. Vide *supra*, page 134.

MORTGAGES

Mortgages should be deducted from value of real estate. Vide Schedule A¹ *supra*, page 101.

Mortgages held by decedent should be listed in Schedule A³ vide *supra*, page 109.

As to mortgages in name of decedent and another vide *Matter of Pitou*, 79 Misc. 384; *Matter of Heiser*, N. Y. Law Journal, July 19, 1913, opinion quoted, *post*, page 804.

As to *BLANKET MORTGAGE* vide *Matter of Tremberger*, N. Y. Law Journal, March 7, 1912, opinion quoted *supra*, page 659, and same case in N. Y. Law Journal, October 31, 1913, *supra*, page 661.

MOTHER

Entitled to five thousand dollars exemption and the lower rates of subdivision 1 of § 221a. Vide page 45.

MOTIVE

Vide Evasion of Tax; Intent.

MUNICIPALITY

Municipal corporations are not exempt. Matter of Hamilton, 148 N. Y. 310; etiam footnote to Matter of Thrall, 157 N. Y. 46, *supra*, page 225.

Testator bequeathed a portion of his estate to the city of Yonkers, in trust. Vide *supra*, page 676, Matter of Saunders, 77 Misc. 54, affirmed, without opinion, 156 App. Div. 891.

MUTUALLY ACKNOWLEDGED RELATION

The five thousand dollar exemption and the rates of subdivision 1 of § 221a apply "to any child to whom any such decedent, grantor, donor, or vendor for not less than ten years prior to such transfer stood in the mutually acknowledged relation of a parent, provided, however, such relationship began at or before the child's fifteenth birthday and was continuous for said ten years thereafter."

BURDEN OF PROOF is upon person claiming relationship. Matter of Davis, 98 App. Div. 546-549, reversed on other points in 184 N. Y. 299, the Court of Appeals holding that beneficiary had sustained burden, *supra*, page 321.

Prima facie case uncontradicted is sufficient to shift burden. Matter of Lane, 39 Misc. 522.

THE BENEFICIARY IS A COMPETENT WITNESS to give "evidence bearing upon the question of the relation and the acknowledgment thereof between himself and the testator." Such testimony is not inadmissible under § 829 of the Code of Civil Procedure. Matter of Brundage, 31 App. Div. 348-352.

Legatees were nieces who sought to establish "mutually acknowledged relationship." The surrogate said: "There is nothing in the evidence to show that she (the testatrix) ever held them out to the public as her children, or they her as a mother. * * * The acts, conduct and every-day life and dealings of the parties have, in our opinion, greater weight in determining the relations which in fact existed between them than mere declarations and speech." Held, that relationship had

not been established. *Matter of Birdsall*, 22 Misc. 180-187, affirmed, without opinion, 43 App. Div. 624.

May come within definition although a niece. *Matter of Davis*, 184 N. Y. 299; *Matter of McMurray*, 96 App. Div. 128; *Matter of Deutsch*, 107 App. Div. 192, appeal withdrawn and surrogate's order affirmed after decision in *Davis* case, *supra*.

UNDER LAWS 1892, chap. 399, held that although relationship began when "child" was adult, still was entitled to exemption. *Matter of Beach*, 154 N. Y. 242. Under present law relationship must begin at or before child's fifteenth birthday.

Under Laws 1905, chap. 368, to entitle a STEPCHILD to the exemption under the then § 221, now subdivision 1 of § 221a, death of both parents was essential prior to child's fifteenth birthday. *Matter of Wheeler*, 115 App. Div. 616; *Matter of Harder*, 124 App. Div. 77.

Laws 1907, chap. 204, put stepchild in 1% class. Again amended by chap. 310, Laws 1908, so that exemption dependent upon there being a mutually acknowledged relationship of parent and child, but not necessary that parents be dead, as in case of others claiming exemption. The statute remained in this form until chap. 732, Laws 1911, in effect July 21, 1911, when all reference to stepchild was stricken out, and there were omitted the words, "the parents of such child shall have been deceased when such relationship commenced."

NATIONAL BANK

In resident estate stock in National Bank is subject to tax. In non-resident estate it is not.

National bank located in New York is a domestic corporation within the provisions of subdivision 18, § 3343 of the Code of Civil Procedure, and prior to amendment by chap. 732, Laws 1911, in effect July 21, 1911, stock held by non-resident decedent was subject to tax. *Matter of Cushing*, 40 Misc. 505.

NECESSARY PARTIES

As to who are necessary parties in transfer tax proceeding vide page 77.

NEPHEW OR NIECE

Entitled to one thousand dollars exemption, and subject to the rates of tax set forth in subdivision 2 of § 221a; *supra*, page 47.

NEW SYSTEM OF TAXATION

Matter of Knoedler, 140 N. Y. 377-380; vide *supra*, page 2.

NEW YORK HISTORICAL SOCIETY

An "educational" corporation within the signification of the word as used in the first sentence of § 221. Matter of De Peyster, N. Y. Law Journal, January 21, 1913, opinion quoted *supra*, page 676, affirmed, without opinion, 156 App. Div. 938.

N. Y. STOCK EXCHANGE

In RESIDENT estate a seat in the New York Stock Exchange subject to the transfer tax. Matter of Hellman, 174 N. Y. 254, *supra*, page 276; Matter of Curtis, 31 Misc. 83.

In NON-RESIDENT estate it is not subject to tax. Subdivision 2 of § 220, and second sentence of § 243. Prior to amendment by Laws 1911, chap. 732, it was held that it was subject to tax. Matter of Glendinning, 68 App. Div. 125, affirmed, without opinion, 171 N. Y. 684.

NEXT OF KIN

For distribution of personal property of decedent in case of intestacy vide Decedent Estate Law, §§ 98-100, *supra*, page 553. Vide the last sentence of § 243 of the Tax Law *supra*, page 36.

As to setting forth distribution on the appraisal vide Schedule D, page 94.

As to RELATIVES OF THE HALF BLOOD vide *supra*, page 46.

RATES OF TAX AND EXEMPTIONS *supra*, page 45.

WHERE NEXT OF KIN UNKNOWN the tax is imposed at highest rate. Matter of Lind, 196 N. Y. 570, *supra*, page 369.

NON-PAYMENT

Vide Interest; Lien of Tax; Payment of Tax.

NON-RESIDENT

Transfers made in non-resident estates subsequent to the amendment of §§ 220 and 243 by Laws 1911, chap. 732, *supra*, page 526, are not taxable unless they are "of tangible property within the state." For discussion of present law and practice vide *supra*, page 133.

The decisions regarding transfers in non-resident estates prior to the 1911 amendment are cited sub Bank Deposit; Bonds; Chose in Action; Deductions; Election; Joint-Stock

Association; Laws of Another State or Country; Legacy; Life Insurance; National Bank; New York Stock Exchange; Partnership; Pledged Securities; Power of Appointment; Promissory Notes; Residence; Stock; Surrogate; Transfer of Securities; Treaty.

The more important decisions under the various statutes prior to the 1911 amendment are as follows:

LAWS OF 1885, chap. 483, in effect June 30, 1885, *supra*, page 404. Matter of Enston, 113 N. Y. 174, *supra*, page 165; Matter of James, 144 id. 6-10.

LAWS OF 1887, chap. 713, in effect June 25, 1887, *supra*, page 413. Matter of Sherwell, 125 N. Y. 376, *supra*, page 168; Matter of Romaine, 127 id. 80; Matter of James, 144 id. 6; Matter of Embury, 154 id. 746, *supra*, page 222; Matter of Gibbes, 176 id. 565, *supra*, page 283; Matter of Crerar, 56 App. Div. 479.

LAWS OF 1891, chap. 215, in effect April 20, 1891. Matter of Phipps, 143 N. Y. 641, *supra*, page 190; Matter of Pettit, 171 N. Y. 654, *supra*, page 266; Matter of Lord, 186 id. 549, sustained in 211 U. S. 477, sub nom. *Beers v. Glynn*, *supra*, page 332.

LAWS OF 1892, chap. 399, in effect May 1, 1892, *supra*, page 424. Matter of Bronson, 150 N. Y. 1, *supra*, page 204; Matter of Whiting, id. 27; *supra*, page 205; Matter of Morgan, id. 35, *supra*, page 206; Matter of Fitch, 160 id. 87, *supra*, page 206; Matter of Hubbard, 21 Misc. 566.

SUBSEQUENT TO LAWS 1892 AND PRIOR TO 1911 AMENDMENT. Matter of Zefita, 167 N. Y. 280, *supra*, page 251; Matter of Blackstone, 171 N. Y. 682; Matter of Glendinning, id. 684; Matter of Newcomb, 172 N. Y. 608; Matter of King, id. 616; Matter of Bushnell, id. 649; Matter of Gibbes, 176 N. Y. 565; Matter of Clinch, 180 id. 300; Matter of Hewitt, 181 id. 547; Matter of Daly, 182 id. 524; Matter of Tilt, id. 557; Matter of Cooley, 186 N. Y. 220; Matter of Gordon, id. 471; Matter of Bishop, 188 N. Y. 635; Matter of Rhoads, 190 id. 525; Matter of Thayer, 193 id. 430; Matter of Grosvenor, id. 652; Matter of Browne, 195 id. 522; Matter of Fearing, 200 id. 340; Matter of Whiting, id. 520; Matter of Tiffany, 202 N. Y. 550, appeal pending in United States Supreme Court.

Matter of Pullman, 46 App. Div. 574; Matter of Preston, 75 id. 250; Matter of Bishop, 82 id. 112; Matter of Hutchinson, 105 id. 487; Matter of Arnold, 114 id. 244; Matter of White,

116 id. 183; Matter of Hillman, id. 186; Matter of Porter, 67 Misc. 19, affirmed, without opinion, 148 App. Div. 896; Matter of Willmer, 153 App. Div. 804.

Matter of Hathaway, 27 Misc. 474; Matter of Abbett, 29 id. 567; Matter of Leopold, 35 id. 369; Matter of Horn, 39 id. 133; Matter of Probst, 40 id. 431; Matter of Cushing, id. 505; Matter of McEwan, 51 id. 455; Matter of Ames, 141 N. Y. Supp. 793; etiam opinion of state comptroller, 1 State Department Reports, 605, quoted *supra*, page 152.

NOTES

Vide Promissory Notes.

NOTICE OF APPEAL

The notice of appeal "shall state the grounds upon which the appeal is taken." First sentence of § 232; Matter of Stone, 56 Misc. 247, and cases cited sub Appeal.

NOTICE OF APPRAISAL

The third sentence of § 230 provides that the appraiser shall give notice of appraisal and § 231 that "the Surrogate shall immediately give notice upon the determination by him as to the value of any estate * * * to all persons known to be interested therein."

Notice should be explicit as to property to be appraised, vide page 79.

For general discussion vide page 77.

Not bound unless notice duly given. Matter of McPherson, 104 N. Y. 306-321; Matter of Wolfe, 137 N. Y. 205-213; Matter of Backhouse, 110 App. Div. 737, affirmed, without opinion, 185 N. Y. 544; Matter of Winters, 21 Misc. 552-555; Matter of Bolton, 35 Misc. 688.

VOLUNTARY APPEARANCE before appraiser and submission to examination as witness held to cure failure of appraiser to give notice required by § 230. Matter of Harriott, N. Y. Law Journal, March 1, 1913.

The surrogate did not give notice of the determination by him as required under § 231, and although the sixty days under § 232 to appeal had expired, the surrogate held that he had authority under § 2481, subdivision 6 of Code of Civil Procedure to modify decree. Matter of Daly, 34 Misc. 148.

Comptroller claimed that a certain transfer of real estate was

subject to tax on ground that it had been made by decedent in contemplation of her death. The surrogate held that the question should not be passed upon without notice to the grantee of the property, and remitted the report to appraiser. *Matter of Wood*, 40 Misc. 155.

Notice of application to exempt estate from tax should be given to state comptroller. *Matter of Collins*, 104 App. Div. 184; *Matter of Schmidt*, 39 Misc. 77. The state comptroller is entitled to notice of appraisal under §§ 230 and 231.

OBJECTIONS

Vide Testimony *post*, page 854.

OBSOLETE SECURITIES

Vide Worthless Securities.

OCCUPATION OF DECEDENT

Should be set forth in Schedule A³, *supra*, page 105.

OFFSET

Vide Pledged Securities.

OPENING DECREE

Vide Vacating Decree.

OPPORTUNITY TO BE HEARD

Vide Notice of Appraisal; etiam *supra*, page 77.

ORDER

Vide Forms. Vide third sentence of § 231, page 19.

"While, for convenience, the taxes upon separate interests passing under the will are included in a single order, the judgments nevertheless are separate and independent. The rights and obligations of the different beneficiaries are disconnected and in no way mutual or joint." *Matter of Bogert*, 25 Misc. 466.

Surrogate's order denying motion to resettle his first order held not appealable to Appellate Division because "it rested entirely within the discretion of the Surrogate whether or not he would change his order as originally made." *Matter of Sondheim*, 69 App. Div. 5. Vide *Matter of Francis*, N. Y. Law Journal, November 26, 1913, *post*, page 886.

Should assess separately immediate cash legacy and interest in trust. *Matter of Guggenheim*, 189 N. Y. 561, *supra*, page 347.

As to exemption to beneficiary vide *Matter of Title Guarantee & Trust Co.*, 81 Misc. 106.

Testatrix in her will "forgave" one-half of certain notes she held against the estate of her brother. The order assessed the tax against the beneficiary of her brother's estate. Held, error and that the tax should have been assessed against the executrix of the brother's estate. *Matter of Wood*, 40 Misc. 155.

TEMPORARY ORDER shall be entered when the tax has been imposed at the highest rate in accordance with the provisions of the sixth paragraph of § 230. Vide opinion of state comptroller cited sub Interest.

OUTLAWED

Debts of decedent barred by statute of limitations, page 131.

As to tax vide § 245 and cases cited sub Statute of Limitations.

OVERDUE TAXES

Vide Interest; Payment of Tax.

OVERPAYMENT OF TAX

Vide Interest; Payment of Tax; Refund.

OWNERSHIP OF PROPERTY

Vide Compromise of Claim; Contemplation of Death; Gift; Property Held in Trust or Jointly; Trust Deed.

"The identification of the property as property belonging to a person deceased at the time of his death, or transferred by him in contemplation of death, must necessarily precede its valuation for the purposes of the transfer tax. The appraiser could not proceed with the appraisal of property as a basis for the imposition of a tax in a particular estate, unless it was made to appear in some way that such property constituted a part of the estate to be appraised. It would therefore seem that if any question arises in the course of the appraisal as to the ownership of the property or the right or title to it, the appraiser should have jurisdiction to determine such questions in the first instance before proceeding with the actual appraisal of the property." *Matter of Cora F. Barnes*, N. Y. Law Journal, December 17, 1913. The surrogate in this estate appointed a referee to hear

and report. As the surrogate decided that the appraiser had jurisdiction, it is not quite plain from the opinion why the matter was referred to a referee.

EVIDENCE NECESSARY in a transfer tax proceeding in order to establish a gift *inter vivos* discussed in *Matter of Loewi*, 75 Misc. 57.

Where ownership of property by decedent is shown to have existed several years prior to death, the executors have burden of showing that the property has not come into their hands. They also are under duty to furnish to appraiser all information they have on the subject which may be beneficial to the State. Refusal to answer material questions is punishable by contempt proceedings. *Matter of David Kennedy*, 113 App. Div. 4-9.

IN ACTION TO CONSTRUE WILL it was held that decedent did not own property which had previously been taxed in transfer tax proceedings. "Both the transfer tax appraiser and the surrogate assumed as a fact that the testator owned this property. No question as to title was raised or litigated or was specifically passed upon." The court directed that the order be modified by striking from it the tax on the property which decedent did not own, and that the tax be refunded. *Matter of Willets*, 119 App. Div. 119, affirmed, without opinion, 190 N. Y. 527.

SECURITIES IN SAFE DEPOSIT BOX. In *Matter of Harry M. Francis*, N. Y. Law Journal, August 12, 1913, Surrogate Cohalan said: "The executrix of the estate of Harry M. Francis, deceased, appeals from the order fixing tax and alleges that the appraiser erred in including in the taxable assets of the estate the value of certain securities claimed by the executrix to be her individual property. The decedent died on the 8th day of May, 1911, a resident of New York County. The executrix, Mary B. Francis, is his widow. The testimony taken before the appraiser shows that prior to 1909 there was a pocketbook marked 'Property of Mary B. Francis' in a compartment of the loan vault in the Morton Trust Company of the City of New York. This compartment was not rented in the name of any individual, but the decedent, as an officer of the trust company, had access to it. In the pocketbook were certificates of stock, unregistered bonds and certificates of deposit. Attached to the stock certificates were transfer powers executed to Mary B. Francis. The certificates of deposit also were in the name of Mary B. Francis.

No evidence was adduced before the appraiser to show when the securities were placed in the pocketbook or by whom they were placed there.

"The executrix, however, claims that the securities belonged to her. The testimony taken before the appraiser shows that on certain occasions when the decedent found it necessary to leave the city he gave the key of the compartment in which the pocketbook was placed to James I. Burke, informing him at the same time that the securities belonged to Mrs. Francis and directing him to deliver them to her if she demanded them. Burke was a mutual friend of decedent and his wife and an officer of the Morton Trust Company. It also appears that on several occasions when Burke called at the residence of the decedent and his wife, the decedent, addressing his wife, said: 'Mary, Jimmy has all your securities,' and Burke replied: 'Yes, I have them downtown.' From November, 1909, until after decedent's death Burke retained possession of the securities. He delivered them to Mary B. Francis after the death of decedent.

"It is difficult to perceive upon what theory these securities can be considered the property of the decedent. The fact that they were in a pocketbook which had indorsed thereon the declaration that the property therein contained was the property of Mary B. Francis raises a presumption that Mary B. Francis was the owner of the securities. It was incumbent upon the State Comptroller to rebut this presumption by showing she was not the owner of the property, but that the decedent was the owner thereof. The only witness examined before the appraiser confirmed this presumption of ownership in Mary B. Francis by stating that the decedent declared in his presence and in the presence of decedent's wife that the securities were the property of Mary B. Francis, and that the witness was holding them, i. e., taking care of them for her. The placing of his wife's securities in a safe deposit compartment owned by the company of which he was an officer was not such an unusual proceeding so contrary to experience and recognized custom as to raise a presumption that the property belonged to the husband and not to his wife. But when after placing the securities in such a compartment he indorsed on the receptacle in which they were placed a declaration that the property belonged to his wife, there is no longer any room for conjecture as to the ownership of the property.

"The absence of proof that the property at any time belonged to the decedent eliminates all consideration of the question of a gift. That would only be pertinent if it were made to appear that the property originally placed in the pocketbook belonged to the decedent and not to his wife. The indorsement on the pocketbook and the declaration of the decedent that the securities belonged to his wife are inconsistent with a presumption of ownership in the decedent.

"In order to justify the imposition of a transfer tax upon the securities contained in the pocketbook it was necessary for the State Comptroller to prove that they were the property of the decedent at the time of his death or that they had been given by the decedent to his wife as a gift in contemplation of death or intended to take effect at or after death. The State Comptroller failed to produce such proof or to sustain the burden imposed on him of showing that the property was subject to the provisions of the Transfer Tax Law. The order fixing tax will therefore be modified by eliminating from the taxable assets of the decedent's estate the value of the securities contained in the pocketbook above referred to." *Vide post*, page 886.

Vide etiam MATTER OF LAWRENCE, N. Y. Law Journal, February 15, 1913, opinion quoted *supra*, page 701.

Vide supra, page 68, as to practice relative to inventory of contents of safe deposit box.

THE HUSBAND OF DECEDENT was a member of a partnership and allowed his profits to remain in the firm's business, opening a special account, which account he had transferred to his wife's name. When his wife died the account was still in her name, and the surrogate held that the ownership of it was in wife, and taxable in her estate. *Matter of Anthony*, 40 Misc. 497.

STOCK stood in name of decedent's wife and had been pledged as collateral security for two notes made by her, the proceeds of the two notes having been paid to husband. In the absence of any other evidence the court held that the state comptroller's contention that the stock belonged to husband and was taxable in his estate was not good. *Matter of Parsons*, 51 Misc. 370-372, affirmed, 117 App. Div. 321.

PARENTS

Each entitled to five thousand dollars exemption and minimum rates of subdivision 1 of § 221a; *supra*, page 45.

PARTIES

Vide *supra*, page 77.

PARTNERSHIP

- | | |
|---|--|
| (1) Interest in copartnership assets without the state. | (4) Notice to comptroller under § 227. |
| (2) Real estate held by partnership. | (5) Non-resident estate prior to 1911 amendment. |
| (3) Partnership agreement. | |

Interest of resident decedent in partnership should be set forth in Schedule A⁵ *supra*, page 117.

HUSBAND allowed his profits to remain in his firm, opening a special account in the partnership books. This account he transferred to the name of his wife, and it so continued until her death. Held, that it was part of her estate, and subject to tax in her estate. Matter of Anthony, 40 Misc. 497.

(1) Interest in copartnership assets without the State

For discussion of, vide opinion of state comptroller in Matter of Dusenberry, 2 State Department Reports, 501, *supra*, page 119.

(2) Real estate held by partnership

IN MATTER OF LAZARUS STRAUS, N. Y. Law Journal, October 9, 1911, an application was made by the executors for an order modifying the order fixing tax on the ground that there should be deducted from the assets of decedent's estate the value of his interest in certain real estate owned by the partnership of which he was a member at the time of his death. Surrogate Cohalan in denying the application, said: "The decedent, who was a member of the firm of L. Straus & Sons, died in January, 1898, leaving a will by which he devised and bequeathed the greater part of his estate to his children. The partnership owned several pieces of real estate in the State of New York, and as the decedent died prior to the enactment of chap. 41 of the Laws of 1903, imposing a tax upon the transfer of real estate to lineals, the executor now contends that the interest of decedent in the real estate held by the firm is not subject to taxation under the provisions of the Transfer Tax Law. The appraiser who was designated to appraise the estate estimated the value of decedent's interest in the partnership of L. Straus & Sons at the sum of \$823,313.17, this being the amount at which his interest was

carried on the private ledger of the firm. There was an agreement between the partners of L. Straus & Sons that if any member of the firm died or retired his executors or representatives should receive for his interest in the partnership the amount standing to his credit on the private ledger of the firm, together with interest at the rate of 6 per cent.

"After the death of the decedent herein there was no partnership accounting or liquidation of partnership assets, and the interest of decedent in the partnership, as shown by the private ledger, was transferred on the books of the firm to the other members of the partnership who were the beneficiaries under decedent's will. Therefore the interest of decedent in the partnership of L. Straus & Sons under the terms of the partnership agreement already referred to consisted upon his decease of a claim against the surviving partners in the sum appearing to his credit in the private ledger of the partnership, namely, \$823,313.17. His interest in the real estate held by the firm was included in the aggregate amount represented by this claim and passed to his executors as personalty (*McFarlane v. McFarlane*, 82 Hun, 238; *Fairchild v. Fairchild*, 64 N. Y. 471; *Van Brocken v. Smeallie*, 140 N. Y. 70; *Darrow v. Calkins*, 154 N. Y. 503)."

(3) Partnership agreement

PARTNERSHIP NOT A LEGAL JOINT TENANCY where "it was only the intention of the parties to bring such property as might then or thereafter be held in the joint name or the individual name of either of them into that joint ownership which is characteristic of a copartnership relation." *Matter of Wormser*, 51 App. Div. 441-444.

IN MATTER OF VIETOR, N. Y. Law Journal, May 8, 1913, opinion quoted sub Good Will, page 714, was discussed the effect of partnership AGREEMENT RELATIVE TO GOOD WILL belonging exclusively to surviving partners. Vide etiam *Matter of Vivanti*, 206 N. Y. 656, *supra*, page 387.

For discussion of § 20 of PARTNERSHIP LAW, vide *Slater v. Slater*, 175 N. Y. 143.

(4) Notice to comptroller under § 227

The state comptroller handed down an opinion, dated February 21, 1913, 2 State Department Reports, 496, as follows: "The department is of the opinion that it is the duty of every bank or other depository to give the comptroller the notice,

under section 227 of the Tax Law, whenever the bank is called upon to TRANSFER THE FUNDS DEPOSITED IN THE NAME OF A PARTNERSHIP, if one of the partners is deceased at the time such application is made. The same ruling would apply where a SAFE DEPOSIT BOX was rented in the name of the partnership and one of the partners dies, relative to allowing the comptroller, personally or by representative, to examine the contents of such box.

"It is true that the text of section 227 of the Tax Law does not refer specifically to securities, deposits or assets belonging to or standing *in a firm name or partnership*, but from a careful reading of section 227 of the Tax Law as a whole the intent is clear that the section is not applicable until the death of the owner or depositor, or until the death of one of the joint owners or depositors.

"Upon the happening of that event the account must stand either 'in the name of a decedent (if an individual account) * * * or in the joint names of such a decedent and one or more persons (if the account stands in the name of two or more persons).' And if the deposit is in the name of a firm or partnership and one of the members dies, I believe the event has happened which makes the provisions of section 227 applicable to such an account, thereby imposing upon the bank or other depositary the requirements set forth in section 227 of the Tax Law before the account can be transferred."

See, however, recent decision of Appellate Division in *People v. Mercantile Safe Deposit Company*, opinion quoted *post*, page 837.

PROCEDURE discussed *supra*, page 64.

(5) Non-resident estates prior to 1911 amendment

PRESENT LAW relative to non-resident estate, *supra*, page 133.

IN MATTER OF EDMUND S. CLARK, N. Y. Law Journal, February 9, 1912, the interest of a non-resident, who died prior to the 1911 amendment, in a partnership having a place of business in this State was held taxable. Contribution of resident special partner should be deducted from the New York assets in the proportion which the New York assets bear to the entire assets of the partnership. Surrogate Fowler in his opinion said: "This appeal is taken by the State Comptroller from the order assessing a tax upon the estate of Edmund S. Clark, who died on the 28th day of May, 1907, a resident of Massachusetts. Up to

the time of his death he was a member of the partnership known as Danforth, Clark & Co., whose principal place of business was in Boston, Massachusetts. The firm had branch offices in Chicago and in the City of New York. On the day of decedent's death the firm had at its branch office in the City of New York a stock of goods valued by the executors herein at \$105,000. There were also collectible accounts due the firm from New York debtors amounting to \$26,174.65. The partnership owed New York creditors, \$36,868.77, leaving net assets in the State of New York amounting to \$94,306.88. The surviving members of the partnership were residents of Massachusetts, but the special partner, whose contribution to the partnership was the sum of \$100,000, was a resident of the State of New York.

"Under the articles of copartnership the decedent was entitled to seven-tenths of the net assets of the firm, and it is alleged by the executors that the value of this interest was the sum of \$125,000. The appraiser reported that the interest of the decedent in the partnership assets in this State is not subject to the provisions of the Transfer Tax Law, and from the order entered on his report this appeal is taken.

"Decedent having died in 1907 the taxation of his estate in the State of New York is governed by the statute in effect at that time (*Matter of Davis*, 149 N. Y. 539). This statute provided that personal property owned by a non-resident and invested or habitually kept in the State of New York was taxable (chap. 399, Laws of 1892; *Matter of Romaine*, 127 N. Y. 80; *Matter of Phipps*, 143 N. Y. 641). The executors contend that the cases above cited do not apply to the matter under consideration, because they determined the taxability of property owned by non-residents individually, while this matter involves the question of the taxability of decedent's interest in a partnership having assets here at the time of the decedent's death. It is true that the legal title to the partnership property in this State vested upon the death of the decedent in the surviving partners for the purpose of liquidation, and that the right of the legal representatives of the deceased partner in the assets was an equitable right to the decedent's share of what was left after the payment of the partnership debts (*Rheinhardt v. Rheinhardt*, 134 App. Div. 440; *Joseph v. Herzig*, 198 N. Y. 456); but it is alleged in the affidavit submitted by the executors that the net value of the partnership assets in this State was the sum of \$94,306.88, and that the legal representatives of the decedent

were entitled to seven-tenths of this amount, subject to any claims of partnership creditors in other States which remained unsatisfied after the application of the partnership property in those States to the payment of the partnership indebtedness. When the value of this interest was actually ascertained and definitely determined its transfer became taxable in the same manner and to the same extent as if the property had belonged to the decedent individually at the time of his death (*Matter of Clinch*, 180 N. Y. 300). For the purpose of ascertaining the value of this interest debts due by the partnership to New York creditors must first be deducted from the firm assets located here (*Matter of King*, 71 App. Div. 581, *aff'd* 172 N. Y. 616). There does not, however, seem to be any authority for holding that the general indebtedness of a partnership to creditors in different States should all be deducted from the New York assets; it would seem to be more equitable and reasonable to deduct from the net assets in New York that proportion of the general indebtedness of the partnership to foreign creditors which the New York assets bear to the entire assets of the partnership (*Matter of Porter*, 67 Misc. 19, *affirmed*, 148 App. Div. 896).

"The executors also contend that the contribution of the special partner constitutes an indebtedness of the firm to a New York creditor, and that the amount should be deducted in full from the New York assets. A special partner in a limited partnership is not entitled to payment of his contribution until the claims of all the partnership creditors are satisfied (§ 37, Partnership Law), and if payment is made to him after dissolution of the firm, but before all the creditors are paid, the amount so paid to him may be reached by a creditor of the partnership who has exhausted his remedies against the partnership assets (*Forman v. Von Pusbau*, 126 App. Div. 629). The interest of a special partner is not strictly a debt at all (*Harris v. Murray*, 28 N. Y. 547; *Hayes v. Meyer*, 35 N. Y. 226). Up to the time of dissolution a special partner is not a creditor of the firm in any sense (*Matter of Price-McCormick Co.*, 69 App. Div. 37). It would therefore appear that the special partner is not a New York creditor within the meaning of the decision in the *Matter of King* (*supra*) directing that debts due to New York creditors should be deducted in full from New York assets for the purpose of ascertaining the value of decedent's interest in the copartnership, but that the special part-

ner's claim is one against the entire assets of the partnership wheresoever situated, and should only be deducted from the New York assets in the proportion which the net New York assets bear to the entire assets of the partnership.

"The order fixing tax will be reversed and the appraiser's report remitted to him for correction as indicated."

As to PROFITS PERMITTED TO REMAIN ON DEPOSIT with firm vide Matter of Probst, 40 Misc. 431.

PATRIOTIC CORPORATION OR ASSOCIATION

Entitled to the exemptions under the second sentence of § 221, vide *supra*, page 41.

PAYMENT OF TAX

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| (1) To whom payment made. | (6) Annuities. |
| (2) By whom paid. | (7) Real estate. |
| (3) When payable from residuary estate. | (8) Enforcement of payment. |
| (4) Discount and interest under § 223. | (9) Tax should be assessed although payment cannot be enforced. |
| (5) Tax payable from corpus, not income. | (10) Final accounting. |
| | (11) Return of overpayment. |

(1) To whom payment made

Payment of tax must be made to state comptroller in the seventeen counties of Albany, Bronx, Dutchess, Erie, Kings, Monroe, Nassau, New York, Niagara, Oneida, Onondaga, Orange, Queens, Rensselaer, Richmond, Suffolk and Westchester.

In all other counties the tax must be paid to the County Treasurer. Sections 222 and 229; *People ex rel. Lown v. Cook*, 158 App. Div. 74, affirmed, without opinion, 209 N. Y. mem.

(2) By whom paid

Section 224, *supra*, page 8, governs.

"Though the administrator or executor is required to pay the tax, he pays it out of the legacy for the legatee, not on account of the estate." Matter of Gihon, 169 N. Y. 443-447; Matter of Swift, 137 N. Y. 77-82.

As to trust or life estates vide *post*, page 761, etiam cases cited sub POWER OF APPOINTMENT, *post*, page 768, and sub REMAINDERS, *post*, page 817.

"Although the executor is required to pay the tax, he pays

it, not for the account of the estate, and as a deduction from the legacy, but on account of the legatee upon whom the tax is imposed. * * * It is merely for the convenience of the State, and to insure certainty of collection that the duty is cast upon the executor of paying the tax." *Jackson v. Tailer*, 41 Misc. 36-38, affirmed, without opinion, 184 N. Y. 603, *supra*, page 322.

"The state now imposes a tax as a condition of permitting the legatee or beneficiary to take the property. It is immaterial from what source the legatee or executor procures the tax; but the states, for their own protection and to insure the collection of the tax, have provided that the executor or administrator shall be liable for its payment; and, in the case of a non-resident, that the property shall not be transferred until the tax is paid. But the tax is not necessarily payable out of the particular property bequeathed or inherited. It may be paid from any source. If, instead of paying the tax out of the property bequeathed, it is paid by the legatee out of his individual property, it becomes at once apparent that the value of the property transferred is its clear market value at the date of decedent's death without any diminution on account of the tax imposed by the state as a condition of the transfer.

"Ordinarily the tax is deducted by the executor from the amount of the bequest and the balance paid to the legatee, but this is done for convenience and not because the legacy is the primary fund for the payment of the tax. The statute does not say that the tax shall be imposed upon the net amount which the legatee receives, but it does provide that the tax shall be imposed upon the clear market value of the property transferred by the will of the decedent. The amount of the tax is not an expense of administration, because the tax is imposed upon the interest of the legatee or beneficiary and not upon the estate." *MATTER OF PENFOLD* (Surrogate Fowler), 81 Misc. 598-602.

"Where a legatee does not accept a legacy in full the transfer tax may only be collected on that part which the legatee accepts." The state is protected by reason of the fact that the part not accepted by the legatee passes to other beneficiaries and the transfer to them is taxed. *MATTER OF MERRITT*, 155 App. Div. 228-232. *Vide etiam* *Matter of Wolfe*, 179 N. Y. 599, *supra*, page 297; *Matter of Cook*, 187 N. Y. 253-259, *supra*, page 337.

'Claims for taxes and the like are not among the class that

have to be presented and proved to the personal representative. It is his duty to pay them, the same as he has to pay the expenses of administration, and he cannot evade that duty by getting a decree for distribution without performing it." *MATTER OF CUMMINGS*, 142 App. Div. 377-391.

(3) When payable from residuary estate

As to when paid from residuary estate vide *Jackson v. Tailer*, *supra*; *Isham v. N. Y. Assn. for Poor*, 177 N. Y. 218, *supra*, page 285; *Matter of Smith*, 80 Misc. 140-143.

IN *MATTER OF SAMUEL MYERS*, N. Y. Law Journal, November 22, 1913, Surrogate Fowler held: "The executors have filed their account and certain legatees have filed objections thereto. In order to determine the question raised by these objections it is necessary for the surrogate to construe certain provisions of the will. The testator in paragraphs two, three and four of his will directed that certain amounts should be paid to the legatees therein mentioned. In paragraph fifth he provided as follows: 'The legacies hereinabove given I direct to be paid in full, without any deduction for transfer taxes, and direct my executors to pay the transfer taxes on said legacies from my residuary estate.' This was followed by a residuary clause. About six months after the execution of this instrument, as the last will of the testator, he executed a codicil by which he gave to Lena Goldman, Emma Myers and Tillie Swartz the sum of \$2,000 each. These legacies were not mentioned in the will. The codicil also provided that the sum of \$2,000 should be paid to his sister, Sarah Adler, and that \$6,000 should be paid to her son, Daniel Adler, in addition to the amounts given to them by the will. These legatees contend that it was the intention of the testator that the legacies given by the codicil should be paid without any deduction on account of the transfer tax.

"It was clearly the intention of the testator that the legacies given in the clauses of the will preceding the fifth paragraph should be paid without any deduction for the transfer tax, because he expressly provides for the payment of such tax out of his residuary estate. If he intended that the tax on the legacies subsequently given by the codicil should also be paid out of the residuary estate, it is reasonable to assume that he would manifest this intention by the use of appropriate language. The words 'the legacies hereinabove given,' contained in the

fifth paragraph of the instrument executed on June 6, 1910, cannot logically or sequentially be held to refer to legacies given by an instrument executed on the 7th of December, 1910. If instead of saying 'the legacies hereinabove given' the testator had said 'the legacies given by my will' there would be some ground for the contention that the legacies given by the codicil, which is a part of the will, were to be paid without deduction for transfer taxes. But the words 'the legacies hereinabove given' limit the exemption from payment of transfer tax to those legacies given in the preceding clauses of the will, and their signification cannot be extended so as to apply to legacies given by a subsequently executed instrument.

"THE CODICIL not only provides for additional amounts to legatees mentioned in the will, but also for legacies to individuals not mentioned in the will. As the words 'legacies hereinabove given' cannot be construed to refer to legacies given by an instrument executed six months after the testator had used these words, neither can they be held to refer to legacies given by the codicil to those who received a certain amount under the prior provisions of the will. It would appear, therefore, that the objections to the account of the executors should be overruled."

(4) Discount and interest under § 223

It is the practice to make a payment within six months so as to obtain advantage of the 5% discount allowed under § 223. *People ex rel. Ripley v. Williams*, 69 Misc. 402-405.

As transfer tax proceedings are often not completed within the six months, the estate should estimate the tax, and a temporary receipt will be issued under sections 222 and 236. This temporary payment on account "is not the concern of appraiser or surrogate. It is deductible from the amount finally found due. If nothing be due, then it must be refunded." *Matter of Skinner*, 106 App. Div. 217-218.

Vide *People ex rel. Lown v. Cook*, 158 App. Div. 74, affirmed, without opinion, 209 N. Y. mem., and cases cited sub *Interest*, *supra*, page 721.

Comptroller is not estopped from appealing because a payment has been made of the tax as assessed. Interest and penalty under § 223 might run against the tax if Comptroller should decline to receive it. Vide *Matter of Bogert*, 25 Misc. 466,

holding there was no estoppel under the circumstances of the case.

(5) Tax payable from corpus, not income

Prior to amendment by chap. 76, Laws of 1899, in effect March 14, 1899, "some of the courts had decided that the transfer tax on life estates was payable out of income," but after said amendment (present § 230) "the legislative intention is clear that the transfer tax shall be paid out of the corpus of the trust estates, and not out of income." *Matter of Tracy*, 179 N. Y. 501-508-510; *supra*, page 292; *Matter of Hoyt*, 44 Misc. 76; *Matter of Vanderbilt*, 172 N. Y. 69-73, *supra*, page 268; *Matter of Bass*, 57 Misc. 531; *Matter of Title Guarantee & Trust Co.*, 81 id. 106-112.

(6) Annuities

Vide *Matter of Tracy*, 179 N. Y. 501-510, *supra*, page 292; and cases cited sub Annuities, *supra*, page 586.

(7) Real estate

Vide cases cited sub Real Estate, *post*, page 811.

IN *HUGHES V. GOLDEN*, 44 Misc. 128 (Kings County), it appeared that the administrator had paid the inheritance tax on the transfer of the real estate. He made the payment from the personal estate which turned out to be insufficient to pay the creditors of decedent. No proceedings to sell real estate under § 2750 of the Code of Civil Procedure were taken within the statutory period and the real estate descended to the heirs who were widely scattered. In a partition of the real estate, the court ruled that out of the proceeds of the partition sale should be paid to the administrator a sum equal to the amount paid for the inheritance tax, and that the administrator pay such sum to the creditors.

REAL PROPERTY MAY BE SOLD BY EXECUTOR to satisfy lien of tax. 2 State Department Reports, 498, opinion quoted, *post*, page 812.

State of New York may be made a party defendant "* * *" in any action brought affecting real estate upon which the people of the state of New York have or claim to have a lien under the transfer tax act. "* * *" Code of Civil Procedure, § 447.

(8) Enforcement of payment

Application was made to the surrogate in *MATTER OF McGEE*, N. Y. Law Journal, February 7, 1913, by the district attorney under § 235 to compel two legatees to pay transfer tax. Surrogate Fowler in granting the application said: "Under the decision of Surrogate Ransom, which will be followed in this case, in the *MATTER OF PROUT*, 19 N. Y. St. Rep. 318, the statute in effect at that time and governing the matter under discussion is construed as placing upon legatees the direct responsibility for the payment of the tax, that decision holding in part: 'In regard to persons interested in the property liable to the tax, other than administrators, executors and trustees, I am of opinion that the surrogate can, on the return of an execution issued upon his decree, as already seen, enforce the decree as provided in SECTION 2555 OF THE CODE.'

"The interposed defense of the STATUTE OF LIMITATIONS does not avail in this matter, because under the provisions of chapter 737 of the Laws of 1899 (§ 245 of present statute) transfer tax proceedings are exempted from the operation of the provisions of the Code of Civil Procedure relating to limitation of proceedings brought under the Transfer Tax Law."

Vide *MATTER OF MEYER*, 209 N. Y. 386, *supra*, page 397, and cases cited sub Lien of Tax, *supra*, page 734.

Executors of NON-RESIDENT decedents not excused from payment of tax because estate has been distributed. If tax is not paid, said Surrogate Fitzgerald, "subsequent proceedings may be taken against the beneficiaries, or against the corporations in which decedent held the stock, as well as against the personal representatives." *Matter of Hubbard*, 21 Misc. 566.

(9) Tax should be assessed although payment cannot be enforced

Whether or not the tax can be collected does not prevent its being assessed. *Matter of Dingman*, 66 App. Div. 228.

(10) Final accounting

The second sentence of § 236 provides, *inter alia*, that "no executor, administrator or trustee shall be entitled to a final accounting of an estate in settlement of which a tax is due under the provisions of this article unless he shall produce a receipt" issued under the provisions of the last sentence of § 222.

As to when provisions of § 236 are not applicable vide *Matter of Meyer*, 209 N. Y. 386, *supra*, page 397.

(11) Return of overpayment

Trustees of estate of donor of a POWER OF APPOINTMENT on death of life tenant made a temporary payment in anticipation of the actual determination of any tax which should be found due from them on transfers of the remainders under the will of the creator of the trust. The court held that four-fifths of the remainder passed under the will of the creator of the trust and that one-fifth of the remainder passed under the power of appointment exercised by the donee in his will. Thereupon the comptroller returned the overpayment to the trustees of the estate of the creator of the trust. The executrix of the estate of the donee thereafter applied to the Supreme Court for a writ of mandamus to compel the state comptroller to issue to her as executrix of the estate of the donee a receipt in full for the transfer tax assessed upon the transfer of the one-fifth of the remainder which the court had held (*Matter of Ripley*, 192 N. Y. 536, *supra*, page 353) had passed under the exercise of the power by her testator. This the court refused to do on the ground that the liability to pay the tax on the transfer of the one-fifth of the remainder was a liability of the donee's estate and not of the donor's estate, and that the payment by the donor's estate in excess of the tax for which it was legally liable was "a purely temporary payment," which could not "in any respect be deemed to have been anything more than a tender to the state comptroller" and that the comptroller was under duty to return to the trustees of the estate of the creator of the trust the excess of such payment when the court decided the amount actually due from the estate of the creator of trust. *People ex rel. Ripley v. Williams*, 69 Misc. 402.

Where the tax has been paid to the county treasurer in pursuance of the provisions of the last sentence of § 222 (*People ex rel. Lown v. Cook*, 158 App. Div. 74), and an amended order has been made reducing the amount of the tax it is the practice (*Matter of Cameron*, 97 App. Div. 436-438, *supra*, page 305, affirmed, without opinion, 181 N. Y. 560), for the state comptroller to issue a warrant or order in the following form:

STATE OF NEW YORK, COMPTROLLER'S OFFICE:

In the Matter of the Transfer Tax
on the Estate of

HELEN G. LAWTON,
Late of Rockland County,
Deceased.

Order of State Comptroller.

WHEREAS, it appears from the records of this office that the above named decedent died a resident of Rockland County on January 29, 1913, and that letters testamentary were issued upon said estate by the surrogate of Rockland County to Henry G. Lawton and others as executors, and

WHEREAS, it appears that on the 28th day of July, 1913, an order was entered by the Surrogate of Rockland County assessing a transfer tax on this estate in the sum of \$11,890.93 and subsequent thereto an amended order was entered on the 18th day of October, 1913, assessing a tax on said estate in the sum of \$11,740.93, and

WHEREAS, it appears that the executors of this estate on July 28, 1913, and within six months from the date of decedent's death paid the treasurer of Rockland County the sum of \$11,296.38 which entitled the representatives of this estate to the proper discount for payment of tax within six months from the accrual thereof, said discount amounting to \$587.05, and

WHEREAS, it appears that the net transfer tax on this estate is the sum of \$11,153.88, and that by reason of the payment of \$11,296.38 made as aforesaid the representatives of said estate have paid the sum of \$142.50 in excess of the amount of transfer tax less discount as aforesaid.

NOW, THEREFORE, I DO HEREBY ORDER AND DIRECT the said treasurer of Rockland County to refund to Henry G. Lawton and others, executors of said estate, the sum of One hundred forty-two and 50-100 (\$142.50) Dollars on account of such excess of tax paid as aforesaid, from any moneys in his hands belonging to the transfer tax account, which said sum will be allowed the said treasurer of Rockland County in the settlement of his quarterly accounts with this department upon presentation of this warrant, together with the receipt of the executors of said estate as a voucher therefor, and also the remission of the fees heretofore allowed the said county treasurer upon the said sum of \$142.50.

IN WITNESS WHEREOF I have hereunto set my hand and affixed my official seal this 5th day of November, 1913.

(SEAL)

J. A. WENDELL,

Deputy Comptroller of the State of New York.

To Henry G. Lawton and others,
Executors.

Vide cases cited sub INTEREST, *supra*, page 721, sub REFUND, *post*, page 815, and sub VACATING DECREE, *post*, page 878.

PENALTY

Vide Interest; Transfer of Securities.

PERPETUAL LEASE

Vide Leasehold.

PERSONAL PROPERTY

In RESIDENT estate tangible personal property within the state is subject to the tax. Vide Schedule A³ *supra*, page 105. Intangible property is also subject to the tax. Subdivision 1 of § 220; Matter of Dusenberry, 2 State Department Reports, 501, opinion quoted, *supra*, page 119.

Prior to amendment by Laws 1911, chap. 732, personal property, wheresoever situated, of resident decedent was taxable. Matter of Swift, 137 N. Y. 77, *supra*, page 178.

In NON-RESIDENT estates tangible personal property within the state is subject to the tax. Intangible property is not. For discussion vide page 133. Decisions affecting transfers made prior to 1911 amendment collated *supra*, page 745.

TRANSFERS TO LINEALS and certain near relatives of personal property was first made subject to the tax by Laws 1891, chap. 215, in effect April 20, 1891 (Matter of Dreyfous, 18 N. Y. Supp. 767).

PERSONAL TAXES

Vide Taxes.

PETITION

Vide Forms, *supra*, page 695.

Application under second sentence of § 230 may be upon a petition the allegations of which are upon information and belief, as authorized by Code of Civil Procedure §§ 2534 and 524. Matter of Kelsey *v.* Church, 112 App. Div. 408.

PICTURES

Vide § 221b *supra*, page 43, as to when exempt.

Pictures should be set forth in Schedule A³ with title and name of artist, and appraisal by expert should be furnished, vide *supra*, page 108.

PLEDGED SECURITIES

Pledged securities should be set forth in Schedule A⁴, *supra*, page 116.

IN MATTER OF THEODORE A. HAVEMEYER, 32 Misc. 416, 4,800 shares of American Sugar Refining Co. had been purchased for decedent at \$600,000, the brokers holding stock at the time of his death as collateral for the purchase price. After death the brokers sold stock at loss of \$72,209.46 which loss was paid by the estate. Held, that said payment was a proper deduction, and that it was error to charge the estate with the value of the sugar stock, Surrogate Thomas saying: "The stock deposited by the decedent with his brokers as extra collateral for the loan of \$600,000 was not the property of the decedent, but formed a portion of an estate created by the decedent under a valid trust instrument, the terms of which were not revocable at his election, except with the consent of the beneficiaries of the trust."

IN MATTER OF PARSONS, 51 Misc. 370-372, affirmed, 117 App. Div. 321, the comptroller contended that appraiser should have taxed certain stock which stood in name of decedent's wife and had been pledged as collateral security for two notes made by her, the proceeds of said notes having been paid to decedent. In the absence of any other evidence the court held that appraiser was correct in not including stock among taxable assets of decedent.

Surrogate Fitzgerald in MATTER OF HURCOMB, 36 Misc. 755 (1902), in reversing the appraiser said: "Decedent was a resident of this State. At the time of her death she was indebted to the Hamilton Bank of this city in the sum of \$2,000, the bank holding as collateral security therefor shares of capital stock of the market value of \$24,000. Prior to the institution of the tax proceeding the executor redeemed the stock by paying the loan with interest. The appraiser omitted from the taxable estate appraised the value of said shares. From the order entered accordingly this appeal is taken by the comptroller,

"The appraiser and the counsel for the executrix rely upon the Pullman case, 46 App. Div. 574. That case, however, instead of being an authority to sustain the order, is a precedent for its reversal. In the Pullman case it appeared that the transaction remained in the same state at the time of the appraisal as at the time of death, that the security had not been resorted to by the pledgee, nor had the personal representative paid the loan and redeemed the collateral. This circumstance is expressly referred to in the opinion of Justice Patterson, for he says: 'These securities are liable to be resorted to by the creditors. In pledge the title to them is in the pledgee and they are not in a situation to be taxed now as property of the estate of Mr. Pullman. All of their amount may be required to pay the debts to which these bonds and stocks are collateral and the creditor's security should not be diminished at this time.'

"The question of residence or non-residence of the decedent would make no difference, for in the Pullman case the assets of the non-resident decedent which were referred to in the opinion were bonds actually located in this State and stocks of domestic corporations, so that they were taxable assets independent of residence. While the debt secured by the pledge of collateral is unliquidated, and the extent of the equity is unascertainable, as was the case in the Matter of Pullman, it may be well that the taxation of any equity therein would be postponed until the transaction had been completed and the value of the decedent's interest therein determined. But after the transaction had been closed, and the interest of the estate therein fixed by redemption of the collateral—to paraphrase the language of Justice Patterson—those securities are no longer liable to be resorted to by creditors; the title to them has reverted to the estate of the pledgor, and they are in a situation to be taxed as property of the estate. They can no longer be required to pay the debts to which they were pledged as collateral, and there is no longer a necessity for protecting the creditor's security, his relation to the matter having terminated."

Non-resident estates

Securities owned by non-residents are not subject to tax, *supra*, page 133.

As to transfers made prior to the 1911 amendment of pledged securities in non-resident estates vide discussion of cases collated in Matter of Ames, 141 N. Y. Supp. 793.

In non-resident's estate "where domestic creditors have in their hands the legal title and the right to resort for the payment of their debts to securities belonging to a non-resident decedent which are not taxable under the laws of this state, the indebtedness due such creditors is not to be offset against the value of property of such decedent otherwise taxable." *Matter of Pullman*, 46 App. Div. 574-578; *Matter of Burden*, 47 Misc. 329-333.

PORTER CASE, RULE IN

Vide page 147.

POSTPONEMENT OF TAXATION

Vide Remainders; Time of Tax.

POWER OF APPOINTMENT

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| (1) Subdivision 6 of § 220. | (12) Power of appointment does not prevent vesting. |
| (2) Amendment. | (13) Where execution of power leaves the title where it was before. |
| (3) Cases prior to 1897 amendment. | (14) The rule in the Cooksey case. |
| (4) Constitutionality. | (15) Election by appointee. |
| (5) Tax imposed upon exercise of power. | (16) Where exercise of the power disposes of only a portion of the property. |
| (6) Jurisdiction of Surrogate. | (17) Exercise of power by will of resident where property without the state. |
| (7) Relationship of donee and appointee governs. | (18) Power created by will of non-resident exercised by will of resident. |
| (8) Direction by donee to pay debt. | (19) Non-resident donee. |
| (9) Remainder not taxable until donee's death if power of appointment absolute. | (20) Non-resident donee prior to 1911 amendment. |
| (10) Imposition of a transfer tax is a statutory not an equitable proceeding. | |
| (11) When tax paid from residuary estate. | |

(1) Subdivision 6 of § 220

The statutory provision governing the transfer of property by the exercise of a power of appointment is contained in § 220 and is as follows:

"A tax shall be and is hereby imposed upon the transfer of any *tangible property within the state and of intangible property*, or of any interest therein or income therefrom, in trust or otherwise, to persons or corporations in the following cases,

subject to the exemptions and limitations hereinafter prescribed: * * *

"6. Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property made either before or after the passage of this chapter, such appointment when made shall be deemed a transfer taxable under the provisions of this chapter in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will."

(2) Amendment

This provision became a part of the statute by Laws of 1897, chap. 284, and has not been amended except that by the Laws of 1911, chap. 732, there were stricken out from the statute, the words: "and whenever any person or corporation possessing such a power of appointment so derived shall omit or fail to exercise the same within the time provided therefor, in whole or in part, a transfer taxable under the provisions of this act shall be deemed to take place to the extent of such omissions or failure, in the same manner as though the persons or corporations thereby becoming entitled to the possession or enjoyment of the property to which such power related had succeeded thereto by a will of the donee of the power failing to exercise such power, taking effect at the time of such omission or failure."

As to the part so stricken out by the 1911 amendment vide *Matter of Dows*, 167 N. Y. 227-232; *Matter of Lansing*, 182 N. Y. 238-247, *supra*, page 308, apparently overruling *Matter of Bartow*, 30 Misc. 27.

(3) Cases prior to 1897 amendment

For decisions prior to the 1897 amendment vide *Matter of Stewart*, 131 N. Y. 274, *supra*, page 172; *Matter of Langdon*, 153 N. Y. 6, *supra*, page 216; *Matter of Harbeck*, 161 N. Y. 211, *supra*, page 234.

(4) Constitutionality

The act is constitutional even though the transfer would not be subject to the tax except for the exercise of the power of appointment. *Matter of Vanderbilt*, 163 N. Y. 597, *supra*, page 240; *Matter of Dows*, 167 N. Y. 227, *supra*, page 248, sustained in 183 U. S. 278, sub nom. *Orr v. Gilman*.

The exercise of a POWER OF APPOINTMENT DERIVED FROM A DEED made prior to the original act of 1885, held taxable where donee exercises power by will. *Matter of Delano*, 176 N. Y. 486, *supra*, page 280, sustained in 205 U. S. 466, sub nom. *Chanler v. Kelsey*.

QUERY as to whether there is a taxable transfer where the power of appointment is exercised by deed, and the transfer of the property would not be subject to the tax if it were not for the exercise of the power of appointment. The dictum in *Matter of Delano*, *supra*, raises a doubt as to the question, the Court of Appeals saying at page 494: "No tax is laid on the power, or on the property, or on the original disposition by deed, but simply upon the exercise of the power by will, as an effective transfer for the purposes of the act. IF THE POWER HAD BEEN EXERCISED BY DEED, a different question would have arisen. * * *"

The question does not appear to have been passed upon in a reported case. The United States Supreme Court in reviewing the *Delano* case, said (205 U. S. 466) *supra*, page 282: "The exercise of the power bestowing property in the present case was made by will. And we need not consider the case, expressly reserved by the Court of Appeals in its opinion, as to the result if it had been exercised by deed."

(5) Tax imposed upon exercise of power

It is the exercise of the power that gives the property to the appointee, and the tax is imposed at the time the property is transferred by the exercise of the power of appointment. *Matter of Vanderbilt*; *Matter of Dows* and *Matter of Delano*, *supra*; *Isham v. N. Y. Assn. for the Poor*, 177 N. Y. 218-223; *Matter of Lowndes*, 60 Misc. 506.

The condition and value of the property at the time of the exercise of the power, and not at the time of the creation of the power, determine its liability to the tax. *Matter of Dows*, 167 N. Y. 227-232, *supra*, page 250.

The transfer under the power is assessed on the value of the whole property passing under it, and not merely on the value of the remainder. *Matter of Tucker*, 27 Misc. 616.

(6) Jurisdiction of surrogate

It is the residence of the donee and not the residence of the donor which fixes the jurisdiction of the surrogate. *Matter of*

Seaver, 63 App. Div. 283; Matter of Lowndes, 60 Misc. 506. As to jurisdiction of surrogate in resident estates vide *supra*, page 56; in non-resident estates, page 137.

(7) Relationship of donee and appointee governs

Relationship of the appointee to the donee and not to the donor governs in determining the rates of tax. Matter of Rogers, 172 N. Y. 617, *supra*, page 274; Matter of Seaver, 63 App. Div. 283.

QUERY, as to what legislature intended if there were two donors of the power. Matter of Walworth, 66 App. Div. 171-175.

The statute also refers to a possible exercise of the power by a corporation. There are no reported decisions on the question; it would seem that the appointees would come under the provisions of subdivision 2, § 221a.

(8) Direction by donee to pay debt

In Matter of Rogers, 172 N. Y. 617, *supra*, page 274, it was held that where a creditor of donee accepts an appointment in his favor in settlement of his debt, there is a taxable transfer.

(9) Remainder not taxable until donee's death if power of appointment absolute

Where there is an absolute power of appointment the remainders are not taxable until the death of the donee. Matter of Howe, 176 N. Y. 570, *supra*, page 284; Matter of Burgess, 204 N. Y. 265-269; Matter of Smith, 80 Misc. 140; Matter of Field, 36 Misc. 279; Matter of Lane, 157 App. Div. 694.

The remainders are taxable at death of testator where the power of appointment is not absolute. Matter of Burgess, 204 N. Y. 265-270; Matter of Turner, 82 Misc. 25.

IN MATTER OF ARMSTRONG, N. Y. Law Journal, February 20, 1912, the surrogate held: "As the powers of appointment granted by the decedent to the various life tenants can only be exercised in the event of such life tenants predeceasing the widow of decedent, the remainders over which such powers may in that contingency be exercised are presently taxable (Matter of Burgess, 204 N. Y. 265). As such remainders cannot in the absence of the exercise of the powers of appointment vest in other than beneficiaries of the 1 per cent. class, they should be taxed at 1 per cent. The order fixing tax will be reversed and

the appraiser's report remitted to him for correction as indicated."

IN MATTER OF GEORGE H. LITCHFIELD, N. Y. Law Journal, July 2, 1913, Surrogate Ketcham held: "The order adjusting the transfer tax reserves for future taxation the interests and estates in remainder after the life estate of the widow. The text of the will is as follows: 'Third, I give, devise and bequeath all my property, real and personal, including the portion of my father's property held by the Brooklyn Trust Company, to my executor, in trust, to convert the same into money, to invest the same, and to collect the income therefrom and apply it to the use of my wife, Helen A. Litchfield, during her life, and upon her death to pay over the principal of the same to the executor named in her will, if she have one, or to her administrator if she die intestate.'

"If, as the executor contends, the will gives the beneficiary a power of appointment over the fund at her death, the transfer is not taxable until the death of the donee of the power (Matter of Burgess, 204 N. Y. 265). The comptroller claims that the gift over is to the next of kin of the life tenant, and if he be right the transfer is presently taxable at the primary rate of 5 per cent. * * * The gift in this will is to the life tenant's executor, subject to the IMPLIED POWER OF APPOINTMENT by which the executor may be directed to dispose of the fund, or, failing a will, it is to the life tenant's administrator necessarily under the duty to distribute the same among the life tenant's next of kin. Until it be known that the life tenant has died there can be no adjustment of the tax upon the remainder. The order must be affirmed."

(10) Imposition of a transfer tax is a statutory not an equitable proceeding

Transfer to appointee taxable upon exercise of the power by donee although tax had by mistake been assessed and paid upon entire fund at time of death of donor. Matter of Buckingham, 106 App. Div. 13.

IN MATTER OF WILLIAM C. STUART, N. Y. Law Journal, May 10, 1913, Surrogate Fowler held: "The executor and trustee under the last will and testament of the descendants has taken this appeal from the order assessing a tax upon his estate. The decedent was given a power of appointment in the will of his mother, Ellen Eliza Ward, who died in 1893. She directed

that a certain part of her estate should be held by trustees; that the income therefrom should be paid to William C. Stuart, the decedent herein, during his life, and upon his death that the trust fund should be paid to such of his or her descendants and in such proportions as he by his last will and testament should direct and appoint, and in the event of his failure to make such appointment, that the corpus of the trust fund should be paid to his children then surviving.

"The decedent exercised the power in favor of his three children, giving to one of them one-third of the trust fund absolutely, and directing that two-thirds be held in trust for the other two children, the income to be paid to them during their respective lives, and the corpus of each child's share to be disposed of as such child by his last will directed and appointed.

"The child to whom the one-third was given absolutely filed with the appraiser a statement alleging that she ELECTED TO TAKE HER SHARE UNDER THE WILL OF HER GRANDMOTHER, Ellen Eliza Ward, instead of under the power of appointment, and the appraiser found that her interest was not taxable. He ascertained the value of the life estates of the two children in the two-thirds of the trust fund appointed to them by the decedent to be \$215,906 and \$221,864 respectively. Upon these amounts a transfer tax was imposed.

"The value of the trust fund in which the decedent had a life estate, and over which he was given a power of appointment, was ascertained by the transfer tax appraiser in the estate of Ellen Eliza Ward to be the sum of \$645,000, and upon this amount a tax of \$6,450 was imposed by the order fixing a tax on her estate. THE EXECUTOR CONTENDS that the payment of the tax in the estate of Ellen Eliza Ward upon the \$645,000 held in trust for the life of the decedent, and over which he was given a power of appointment, was a payment of the tax on the life estate of the decedent as well as upon the remainder over which he had the power of appointment, and that therefore no tax can now be imposed upon the transfer of property affected by the exercise of the power of appointment.

"The transfer tax statute in force at the time of decedent's death provided that 'whenever any person shall exercise a power of appointment * * * such appointment when made shall be deemed a transfer taxable under the provisions of this chapter in the same manner as though the property to which appointment relates belonged absolutely to the donee of

such power and had been bequeathed or devised by such donee by will.' Under this statute the transfer of the property over which the decedent exercised the power of appointment is subject to a tax (*Matter of Vanderbilt*, 50 App. Div. 246, aff'd 163 N. Y. 597; *Matter of Howe*, 86 App. Div. 286, aff'd 176 N. Y. 570), unless the taxation of the corpus of the trust fund in the estate of Ellen Eliza Ward estops the State of New York from the enforcement of its rights under the statute.

"Chapter 399 of the Laws of 1892, which was the transfer tax statute in force when Ellen Eliza Ward died, provided that 'taxes upon the transfer of any estate, property or interest therein limited, conditioned, dependent or determinable upon the happening of any contingency or future event by reason of which the fair market value thereof cannot be ascertained at the time of the transfer, as herein provided, shall accrue and become due and payable when the persons or corporations beneficially entitled thereto shall come into actual possession or enjoyment thereof.' The value of the estates or interests which might pass to the appointees of the decedent herein by virtue of the power of appointment contained in the will of Ellen Eliza Ward was not ascertainable at the time of the appraisal of her estate. The decedent could divide the trust fund among his descendants or among his mother's descendants in such proportions as he desired; he could appoint a portion to children of his brother, and such portion would be taxable at the rate of 5 per cent. Therefore, neither the value of the interests of the appointee nor the rate of tax which could be imposed upon the transfer of such interests was ascertainable at the time of the death of Ellen Eliza Ward.

"The value of the life estate of the decedent in the trust fund over which he had the power of appointment was taxable at the time of the appraisal of his mother's estate, but the interests of the appointees under his will were not then taxable (*Matter of Roosevelt*, 143 N. Y. 120; *Matter of Sloan*, 154 N. Y. 109). Therefore the appraiser of the estate of Ellen Eliza Ward erred in reporting as taxable at that time the value of the entire trust fund in which the decedent had a life estate and over which he was given a power of appointment. But that mistake was made in the taxation of the estate of Ellen Eliza Ward, and it cannot operate to prevent the State of New York from assessing a tax upon the interests which were transferred by virtue of the power of appointment exercised by the decedent herein.

“IT WAS THE EXERCISE OF THE POWER OF APPOINTMENT and not the creation of the power which effected the transfer of a life estate in two-thirds of the trust fund to the appointees mentioned in the will of the decedent, and upon such transfer tax may be imposed (Matter of Seaver, 63 App. Div. 283; Matter of Walworth, 66 App. Div. 171). The tax is imposed upon the transfer of the property, and the transfer effected by the exercise of the power of appointment by the decedent is taxable, irrespective of any tax that may have been imposed upon the transfer of the same property in the estate of Ellen Eliza Ward.

“As the imposition of a transfer tax is a statutory and not an equitable proceeding, this court cannot depart from the procedure prescribed by the transfer tax statute in order that equity may be done between the State of New York and the beneficiaries of decedent's bounty. THE MISTAKE COMMITTED IN ASSESSING A TAX upon the estate of Ellen Eliza Ward could have been corrected in the manner prescribed by statute, but the fact of its having been made and not corrected cannot now prevent the imposition of a tax upon the transfer of interests effected by the exercise of the power of appointment vested in the decedent. Order fixing tax affirmed.”

(11) When tax paid from residuary estate

As to payment of tax from residuary estate of DONEE, vide *Isham v. N. Y. Assn. for Poor*, 177 N. Y. 218, *supra*, page 285.

IN MATTER OF SMITH, 80 Misc. 140, Surrogate McCauley of Rockland County, held that in the estate in question the taxes should be paid from the residuary estate of DONOR, saying at page 144 that the question was “merely one of interpretation. Did the testator intend, and so express himself in the first clause of his will, that the appointees, and ultimate beneficiaries, in the event of the exercise of the power of appointment, should receive the gifts or bequests in full and without diminution by reason of any succession or transfer tax that might be imposed thereon? We think he did.”

The clause referred to provided “that all the gifts, bequests, devises and legacies hereinafter mentioned be paid, transferred or received in full (subject to any provisions for abatement hereinafter contained), and that all succession or transfer taxes imposed thereon, or on any of them, be paid out of my residuary estate.”

(12) Power of appointment does not prevent vesting

"The existence of an unexecuted power of appointment does not prevent the vesting of a future estate, limited in default of the execution of the power." Section 41 of Real Property Law; Matter of Haggerty, 128 App. Div. 479-481, affirmed, without opinion, 194 N. Y. 550.

The same principle applies to a grant or bequest of personal property. Matter of Moehring, 154 N. Y. 423-427; Matter of Cooksey, 182 id. 92-97.

(13) Where execution of power leaves the title where it was before

If the donee exercises a power of appointment in such a way that the beneficiary receives the property the same as though the power had not been exercised there is no tax on the transfer under the provisions of subdivision 6 of § 220. Matter of Lansing, 182 N. Y. 238, *supra*, page 307; Matter of Backhouse, 185 id. 544; Matter of Spencer, 190 id. 517; Matter of Ripley, 192 id. 536; Matter of Haggerty, 194 id. 550; Matter of Lewis, id. 550; Matter of Chapman, 199 N. Y. 562, *supra*, page 371; Matter of Haight, 152 App. Div. 228; People ex rel. Ripley v. Williams, 69 Misc. 402.

It should be borne in mind, however, that if the transfers from the donor are subject to tax and the taxation has been postponed because of the existence of a power of appointment, then the transfers will be taxable in donor's estate if the power is not exercised in the donee's estate. People ex rel. Ripley v. Williams, *supra*.

IN MATTER OF MARY C. TOMPKINS, N. Y. Law Journal, August 11, 1913, Surrogate Cohalan held: "As the power of appointment was exercised by William H. Tompkins, the property transferred by virtue of the exercise of such power is taxable as part of his estate (subdiv. 6, sec. 220, Tax Law; Matter of Leeds, N. Y. Law Journal, April 23, 1913). If the decedent in exercising the power of appointment did not effectually dispose of all the property subject to the power an order may be entered in the estate of the donor of the power assessing a tax upon the value of the property remaining undisposed of after the exercise of the power."

Matter of Leeds, *supra*, opinion quoted, *post*, page 863.

(14) The rule in the Cooksey case

Where the donor of the power provides the way the remainders shall go if the power of appointment is not exercised, and the donee by will makes changes with reference to paying over the remainder, the exercise of the power cannot be treated as a nullity, and is taxable. *Matter of Cooksey*, 182 N. Y. 92; *Matter of Warren*, 62 Misc. 444.

(15) Election by appointee

In *Matter of Margaret E. Mitchill*, N. Y. Law Journal, November 22, 1913, the donee, who died February 7, 1912, exercised a power in favor of the same persons who would have taken the property if the power had not been exercised. Surrogate Fowler said, *inter alia*: "The state comptroller contends that the legatees, if they wished to avoid the imposition of a tax, should have filed with the appraiser a notice in writing indicating their intention of electing to take the property under the will of Samuel L. Mitchill, and not by virtue of the power of appointment exercised by the decedent. Such notices of election have been filed with the papers on this appeal. As the transfer tax is a special tax, it is incumbent upon the taxing officer to show that the property or interest which he contends is subject to taxation has been transferred in the manner prescribed by the transfer tax statute. In the matter under consideration the appellants derived their right to the property from the will of Samuel L. Mitchill, and its transfer to them under and by virtue of the provisions of his will was not subject to a tax. As the will of the decedent did not increase or diminish the value of their respective interests as transferred by the will of Samuel L. Mitchill, they may disregard the attempted transfer contained in her will.

"IN THE ABSENCE OF DIRECT PROOF, it will be presumed that persons entitled to take property, either burdened with a transfer tax or without such a burden, will accept that form of transfer which relieves them from the necessity of paying the tax. The order fixing tax will be reversed, and the appraiser's report remitted to him for the purpose of omitting from his appraisal the property held in trust for the life of the decedent, and over which she exercised the power of appointment."

VIDE ETIAM *Matter of Backhouse*, 185 N. Y. 544, *supra*, page 328 and cases cited sub Election, page 679.

(16) Where exercise of the power disposes of only a portion of the property

Vide *Matter of Ripley*, 192 N. Y. 536, *supra*, page 353; *Matter of Stuart*, *supra*, page 772.

(17) Exercise of power by will of resident where property without the state

Exercise of power by will of resident under power given by will of resident held taxable although the personal property transferred by the donee was without the state. *Matter of Hull*, 186 N. Y. 586, *supra*, page 335.

(18) Power created by will of non-resident exercised by will of resident

Surrogate Fowler in *MATTER OF ANNIE FRAZIER*, N. Y. Law Journal, March 28, 1912, held, that where a resident of this state is given a power of appointment over property by the will of a non-resident, the property passing by virtue of the exercise of such power of appointment is taxable in this state. The surrogate said: "This appeal is taken by the executors from an order assessing a tax upon the estate of decedent.

"Nalbro Frazier, the father of decedent, was a resident of Pennsylvania. He bequeathed certain personal property to trustees with directions that the income thereof be applied to the use of decedent during her life, and in the event of her dying without issue, that the corpus of the trust fund be paid to such person or persons as the decedent by any instrument of writing in the nature of a last will and testament should direct or appoint. The decedent died on the 1st day of January, 1911, a resident of the County of New York. She left no issue, but she made a will by which she exercised the power of appointment given to her in the will of her father. The transfer tax appraiser reported that the transfer of the property constituting the trust fund was taxable. The appellants contend that such property is not taxable under the transfer tax laws of this State; but that if section 220 of the Tax Law be held to authorize the imposition of a tax upon property so transferred, then that such act is unconstitutional.

"The State Comptroller also appeals from the order fixing tax upon the ground that the appraiser erred in exempting from taxation a bequest of \$1,000 to the Bishop of the Protestant Episcopal Church of South Dakota.

"The right of an individual to make a will or testamen-

tary instrument is not a natural or inherited right, but a privilege which the State can grant or withhold at its discretion. If granted, it may impose such limitations upon the privilege as the Legislature sees fit to prescribe (*Matter of Dows*, 167 N. Y. 227). The transfer tax is not a tax on property, but on the privilege granted by the State to an individual to succeed to the property of a deceased person, and the power which confers this privilege may impose a tax upon it. (*Magoun v. Illinois Trust Co.*, 170 U. S. 283). As the decedent was a resident of this State, the privilege of making a will by which she disposed of the property constituting the trust fund was one granted by this State. That she might have exercised the power by an instrument in writing in the nature of a last will and testament is immaterial, because as a matter of fact she did not attempt to exercise the power by any other writing than that propounded in this State as her last will and testament. *Matter of Hull*, 111 App. Div. 323. The trustees of her father's estate paid to the executors appointed under the decedent's will in this State the property constituting the trust fund held by them, and the executors distributed this property to the various legatees in accordance with the provisions of decedent's will. Therefore the right of these legatees to succeed to the property was derived from the will of decedent, and upon this privilege the State of New York may impose a tax. *Matter of Delano*, 176 N. Y. 486, sustained *sub nom. Chandler v. Kelsey*, 205 U. S. 466. It has been held that where the donor of the power was a resident of this State and the power was exercised by a non-resident, the property passed by virtue of a privilege granted by the State where the party exercising the power of appointment resided, and that it was not taxable here. *Matter of Kissell*, 65 Misc. 443, affirmed, without opinion, 142 App. Div. 934; *Matter of Fearing*, 200 N. Y. 340. In the *Matter of Fearing* the court said: 'As Mrs. Sheldon (the donee of the power) in making a will exercised a privilege granted by the laws of her own State and not by those of this State, the transfers of property effected thereby were beyond the reach of our tax laws.'¹ Conversely, as the

¹ It should be borne in mind that in the *KISSELL CASE*, *supra*, that the transfer of stocks in domestic corporations was held taxable, and in the *FEARING CASE*, *supra*, the transfer of a deposit in a New York Trust Company evidenced by a certificate of deposit physically located without the state was held subject to the tax.

property constituting the trust fund over which the decedent exercised a power of appointment was transferred to the various legatees mentioned in the decedent's will by virtue of a privilege granted by this State, such transfer is taxable.

"The bequest to the Bishop of the Protestant Episcopal Church in South Dakota is exempt from taxation (sec. 221 of the Tax Law; *Matter of Palmer*, 33 App. Div. 307)."

Surrogate Ketcham in *MATTER OF HANNAH H. SEAMAN*, N. Y. Law Journal, December 5, 1913, held: "Two questions are presented by the comptroller's appeal from the assessment of the transfer tax, as to one of which it is agreed that there must be a remission of this matter to the appraiser. The other concerns the failure to impose the tax upon the transfer of a certain fund situate in Pennsylvania and created by the will of a resident of that State. The will of the Pennsylvania resident conferred upon the decedent above named the power to appoint by will the persons to take the said fund in the event of her own death. Pursuant to such power, the decedent, a resident of this State, by a will executed in this State, made an appointment which is the transfer involved in this discussion. The taxability of that transfer was determined by Judge Fowler in the *MATTER OF FRAZIER*, N. Y. Law Journal, March 28, 1912 (in which case the learned surrogate reversed the rule which had been previously declared in his court, and his conclusion received reflex support from the decision in *Matter of Fearing*, 200 N. Y. 340). This court accepts the reasoning as well as the authority of the case first cited. The order appealed from is reversed in respect of both dispositions assigned as error in the notice of appeal, and the proceeding is remitted for a readjustment accordingly."

Surrogate Thomas held in *MATTER OF THOMAS*, 39 Misc. 136 (1902), that exercise of power of appointment by will of resident under power conferred by will of non-resident was not taxable where the property transferred is not situated within the state. This case was urged by the estate in *Matter of Frazier*, *supra*, and as the surrogate did not adopt its reasoning it may be considered as being overruled.

(19) Non-resident donee

The exercise by a non-resident donee of a power of appointment derived from the disposition of property made by the will of a resident raises questions not free from doubt which have

not yet been directly passed upon by the courts since the 1911 amendment. As was said by Justice Earl, "the law makers cannot always foresee all the possible applications of the general language they use." *L. S. & M. S. Ry. Co. v. Roach*, 80 N. Y. 339-344.

Assume that A died August 18, 1912 leaving a will by which he bequeathed certain stocks and bonds to a trustee in trust to hold the same for B during her lifetime, and to receive and pay over the dividends and interest thereof to B; and upon her death to deliver said stocks and bonds so held in trust for her to such person or persons as B should appoint by her last will and testament.

At the death of A, a resident of the state of New York, the only transfer taxable would be the life estate of B. *Matter of Howe*, 176 N. Y. 570, *supra*, page 284; *Matter of Burgess*, 204 N. Y. 265-270, *supra*, page 382.

If B should fail to exercise the power of appointment then the transfer of the remainder would be taxable in the estate of A. *People ex rel. Ripley v. Williams*, 69 Misc. 402. If B exercised the power then the transfer of the remainder would not, as the law has so far been interpreted, be taxable in the estate of A, but would be taxable, if at all, as though the property belonged absolutely to B. *Matter of Tucker*, 27 Misc. 616; subd. 6 of § 220.

B dies January 2, 1914, a non-resident of the state at the time of her death. By her will B exercises the power of appointment derived from the will of A. Such appointment made by B is, in the words of subdivision 6 of § 220, "deemed a transfer taxable under the provisions of this chapter in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will." *Matter of Rogers*, 172 N. Y. 617, *supra*, page 274; *Matter of Seaver*, 63 App. Div. 283; *Matter of Walworth*, 66 id. 171.

The only transfer made by the will of B, a non-resident, which is subject to the tax, since the amendment by Laws of 1911, chap. 732 of subdivision 2, § 220, is "of tangible property within the state." The 1911 amendment added to § 243 its present second sentence, *supra*, page 526, which specifically provides that stocks and bonds are not tangible property. Therefore, the transfer of the said stocks and bonds of which A, a resident,

died possessed escape taxation except as to the tax upon the transfer of the life estate of B.

As *Matter of Fearing*, 133 App. Div. 337, *supra*, page 373, was affirmed in 1910 by the Court of Appeals in 200 N. Y. 340, it would seem that the legislature intended this result when it enacted the 1911 amendment. It is not plain, however, upon what theory it proceeded.

(20) Non-resident donee prior to 1911 amendment

Exercise of power of appointment by non-resident taxable only as to taxable assets within the state, even though the donor of power was a resident. *Matter of Fearing*, 138 App. Div. 881-884, *supra*, page 373, affirmed, 200 N. Y. 340.

IN *MATTER OF LOWNDES*, 60 Misc. 506, the donee of a power of appointment, a non-resident, exercised a power of appointment in connection with REAL ESTATE situated in New York County. Held, that transfer was taxable and that Surrogates' Court of that county had jurisdiction.

IN *MATTER OF KISSEL*, 65 Misc. 443, affirmed, without opinion, 142 App. Div. 934, Surrogate Cohalan said: "As the power of appointment given to the decedent herein was exercised by her while a resident of the State of New Jersey, and was consummated by the probate of her will under the laws of the State of New Jersey, the general privilege of permitting all the property included within the power to pass to the beneficiaries appointed by the decedent was a privilege granted by the State of New Jersey and not by the State of New York. The only privilege granted by the State of New York was to permit the transfer of the property located in New York to pass to the appointees in accordance with the provisions of the will probated in New Jersey. Therefore, the jurisdiction of the State of New York to tax the transfer of property passing under the will of the decedent is limited to the property situated in this State at the time of her death." The grantor of the power died in 1886 a resident of New York, and as he limited the disposition of his estate to "lineals" it was not taxable in his estate, being taxable, if at all, in the estate of the life tenant exercising the power of appointment. The property over which the power of appointment was exercised consisted of stocks of domestic corporations and of foreign corporations and bonds physically located outside of the state at life tenant's death. The domestic stocks were held subject to the tax, and the remaining

property not. The donee died prior to the 1911 amendment to § 220.

IN MATTER OF LORD, 186 N. Y. 549, the husband of decedent, a non-resident, exercised a power of appointment in favor of his wife who died ten days after his death. The property over which he exercised the power was situated within this state. Held, that the property transferred by the power vested immediately upon the husband's death and was taxable in the estate of wife although she did not live to take possession of the property. It will be noted that in husband's estate the transfer by the exercise of appointment was not taxable (page 153 of 111 App. Div.) because the surrogate did not have jurisdiction as the law then stood (January 8, 1892); this jurisdictional defect was remedied by chap. 399, Laws 1892, vide Matter of Fitch, 160 N. Y. 87, *supra*, page 231, and Matter of Embury, 154 id. 746, *supra*, page 222.

POWER OF REVOCATION

Vide Matter of Brandreth, 169 N. Y. 437-442, *supra*, page 254; etiam cases sub Gift and sub Trust Deed.

POWER OF STATE TO TAX

Vide Constitutionality.

POWER TO INVADE PRINCIPAL

Where a life estate is created with the power reserved to invade principal before death of life tenant, the case comes within that portion of § 222 which provides that "Taxes upon the transfer of any estate, property or interest therein limited, conditioned, dependent or determinable upon the happening of any contingency or future event by reason of which the fair market value thereof cannot be ascertained at the time of the transfer as herein provided, shall accrue and become due and payable when the persons or corporations beneficially entitled thereto shall come into actual possession or enjoyment thereof."

IN MATTER OF BABCOCK, 37 Misc. 445-447, affirmed, 81 App. Div. 645, the court say: "There is nothing in the amendment of § 230 by chapter 76 of the Laws of 1899, indicating an intention to repeal or limit § 222 respecting the appraisement of this class of conditional transfers."

IN MATTER OF GRANFIELD, 79 Misc. 374 (1913), the will was construed to give to life tenant a life estate with the absolute

beneficial power of disposition of the principal during her lifetime with remainder over of such part as she may not dispose of to the persons named in the will of testator. Surrogate Sawyer, Westchester County, in his opinion said: "Should any tax be assessed and collected at the present time upon the interest given by this will to the remaindermen in view of the fact that the testator gave to his daughter, not only a life estate in the land, but power of disposition and the use of the proceeds.

"The attorney for the comptroller contends that the interest given by the will of the testator in the second clause should be immediately appraised and assessed and the tax paid under the following clause of § 230 as amended by chapter 368 of the Laws of 1905:

"When property is transferred in trust or otherwise and the rights, interest or estates of the transferees are dependent upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended or abridged a tax shall be imposed upon said transfer at the highest rate which, on the happening of any of the said contingencies or conditions, would be possible under the provisions of this article, and such tax so imposed shall be due and payable forthwith by the executor or trustee out of the property transferred."

The surrogate then quotes § 222, and says: "In this case the clear market value of the property transferred cannot be ascertained until the death of Olive L. Granfield. To tax the estate at the present time, in the event nothing should ultimately pass to the remaindermen, would be imposing a tax upon the property, and not upon the transfer, in direct conflict with the whole theory of the transfer tax."

After quoting from Babcock case, *supra*, he says: "The question considered in the Babcock case was pursuant to chapter 76 of the Laws of 1899. The portions of sections 230 and 222 as cited above are exactly the same as sections 230 and 222 as amended by chapter 368 of the Laws of 1905.

"I have carefully considered section 230 of the Tax Law, as amended by chapter 368 of the Laws of 1905 which applies to the case at bar, and I find nothing which indicates any intention to repeal, by implication or otherwise, section 222 of the Tax Law respecting the appraisement of this class of conditional transfers. Surely the fair market value of the remainder cannot be ascertained until the death of the life tenant, at which time the remaindermen, being the parties beneficially entitled thereto,

will come into the actual possession or enjoyment of what may be left of the corpus of the estate. If section 222 means anything, it must mean that in a case of this kind the taxing of the remainder interest should be postponed until such time as a clear market value can be established and determined. The clear market value can only be established and determined at the death of the life tenant. * * *

"An order may be entered vacating and setting aside the order assessing the tax herein in so far as the same may affect the remainder interest, and the time for appraising and assessing the tax upon the said interest transferred by the will of Horace Granfield may be postponed until the death of the life tenant when the clear market value can be ascertained and determined."

The Granfield case was not appealed by state comptroller.

Vide opinion of state comptroller, dated May 19, 1913, quoted sub Remainders, *post*, page 825.

PRACTICE

Preliminary to appointment of appraiser, page 54.

Designation of appraiser and notice of hearing, page 72.

The appraisal, page 82.

The schedules of assets, page 96.

The schedules of deductions, page 124.

Vide various orders indexed sub Forms.

In non-resident estates, vide page 133.

Vide Appeal; Deposition; Interest; Payment of Tax; Surrogate; Testimony; Time of Tax; Title of Proceeding; Vacating Decree.

PREMATURE APPRAISEMENT

Matter of Mason, 120 App. Div. 738-740, affirmed, without opinion, sub nom. Matter of Naylor, 189 N. Y. 556, *supra*, page 345; Matter of Stuart, N. Y. Law Journal, May 10, 1913, opinion quoted *supra*, page 772; Matter of De Sala, id., July 20, 1912, opinion quoted *supra*, page 860.

PRESENTLY TAXABLE

Vide Time of Tax.

PREVENTION OF CRUELTY

Vide Enforcement Laws Concerning Children or Animals.

PRIMARY RATES

Vide § 221a; Matter of Schwarz, 209 N. Y. mem., *supra*, page 399. For discussion and tables *supra*, page 44.

For rates under Laws 1910, chap. 706, *supra*, page 520, in effect July 11, 1910, repealed by Laws 1911, chap. 732, in effect July 21, 1911, vide Matter of Jourdan, 206 N. Y. 653, *supra*, page 386.

PRIOR STATUTES

Arranged in chronological order, *supra*, pages 403 et seq.

PRIVATE BUSINESS CORPORATIONS

"There may be no 'market value' for the stock of private business corporations." Matter of Valentine, N. Y. Law Journal, December 4, 1913; Matter of Rees, 208 N. Y. 590, *supra*, page 392; and cases cited sub Closely Held Stock.

PROCEDURE

The method of procedure in inheritance tax proceedings is governed by the statute in force when the proceedings are taken, page 55.

Preliminary to appointment of appraiser, page 54.

Designation of appraiser and notice of hearing, page 72.

The appraisal, page 82.

The schedules of assets, page 96.

The schedules of deductions, page 124.

NON-RESIDENT estates, page 133.

Vide Appeal; Deposition; Interest; Payment of Tax; Surrogate; Testimony; Time of Tax; Title of Proceeding; Vacating Decree.

PROFITS

Vide Closely Held Stock; Good Will.

PROMISSORY NOTES

Notes due decedent should be set forth in Schedule A³. As to testator cancelling notes by will vide *Morgan v. Warner*, 45 App. Div. 424-427, affirmed, on opinion below, 162 N. Y. 612, *supra*, page 237; Matter of Wood, 40 Misc. 155, *supra*, page 111.

Taxation of note in litigation should be reserved "for future appraisalment in case the administrators succeeded in collecting it." Matter of Westurn, 152 N. Y. 93-103.

Notes against decedent discussed sub Schedule B³ *supra*, page 131.

In NON-RESIDENT'S ESTATE notes are not subject to tax. As to law prior to 1911 amendment vide *Matter of Tiffany*, 143 App. Div. 327, affirmed, on opinion below, 202 N. Y. 550, *supra*, page 377; *Matter of Gibbs*, 60 Misc. 645-646.

PROPERTY

Property taxable, vide page 2. As to non-resident estate, page 133.

PROPERTY HELD IN TRUST OR JOINTLY

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| (1) The decisions are not uniform. | (6) Delivery of the bank book will not in itself make trust irrevocable. |
| (2) Real estate. | |
| (3) Bank accounts in joint names. | |
| Reported decisions. | (7) Where moneys forming the account do not belong to decedent. |
| Opinions published in N. Y. Law Journal. | |
| Matter of Schroeder. | (8) Money deposited by a wife in trust for her husband, she retaining possession of bank book, is taxable upon her death. |
| Matter of Wunsch. | |
| Mere form of account does not control. | (9) Bond and mortgage executed to a husband and wife as mortgagees. |
| Matter of Von Bernuth. | |
| Presumption that each joint depositor owns one-half of the deposit. | (10) Mortgages assigned to decedent and her daughter with right of survivorship. |
| (4) Bank accounts in trust. | (11) In absence of proof there is a presumption of equal ownership. |
| Tentative trust revocable at will. | |
| Where transfer not absolute. | (12) Joint ownership of personal property. |
| Absolute and irrevocable trust. | |
| (5) Delivery of bank book to cestui que trust. | |

In transfer tax parlance property held by the decedent "in trust for or jointly with another" refers more especially to that class of cases in which the decedent has retained possession of the property in part or in whole, or has reserved to himself the control of the property during his lifetime. As for instance, where A opens a bank account in name of "A in trust for B," *Matter of Halligan*, 82 Misc. 30, *post*, page 798; or in name of "A and B, either survivor may draw," *Matter of Durfee*, 79 Misc. 655; or in name of "A and B, either to draw," *Matter of Wunsch*, N. Y. Law Journal, January 24, 1913, *post*,

page 790. Or where the property, such as a mortgage, is held in the joint names of A and B, *Matter of Spring*, 75 Misc. 586, *post*, page 792; *Matter of Pitou*, 79 id. 384. Vide, however, *Matter of Heiser*, N. Y. Law Journal, July 19, 1913, *post*, page 804.

For discussion of kindred transfers vide *Contemplation of Death*, *supra*, page 643; *Gift*, *supra*, page 697; *Ownership of Property*, *supra*, page 748; *Trust Deed*, *post*, page 867. Etiam *supra*, page 35.

(1) The decisions are not uniform

The cases of *Matter of Stebbins*, 52 Misc. 438 (1907), and *Matter of Graves*, id. 433, both Monroe County, are frequently quoted by attorneys, but these decisions have not been followed in many of the later adjudications. *Matter of Kline*, 65 Misc. 446; *Matter of Von Bernuth*, N. Y. Law Journal, March 1, 1913, *post*, page 791.

The question has not been passed upon by the Court of Appeals in a transfer tax case, and as the conclusions of the lower courts have not been uniform it would seem that the practitioner might best be aided by a rather full citation of the cases.

The decisions deal with different phases of the question, the transfer being taxable, if at all, under the provisions of subdivision 4 of § 220. If the facts of a particular case indicate that the transfer was not within the meaning and intendment of subdivision 4 then the transfer is not taxable.

The cases may be grouped into those relating to bank accounts and those dealing with personal property other than bank accounts.

(2) Real estate.

As to real estate held in joint tenancy there does not appear to be any reported decision in a transfer tax case, except the recent case of *Matter of Heiser*, N. Y. Law Journal, July 19, 1913, *post*, page 804. It is the practice, however, not to tax the transfer of real property where it is held either in joint tenancy or in tenancy by the entirety.

It would seem where real estate is held either by joint tenants, or by tenants by the entirety, that there is not a taxable transfer to the survivor within the definition of the statute. Vide *supra*, page 34.

In the case of "joint ownership of personal property" (Matter of Heiser, *post*, page 804), it is not altogether clear that the interest which matures to the survivor upon the death of the co-tenant is a taxable transfer, even though the joint tenancy was not created upon a consideration. This theory, however, is not supported by the recent opinions of the surrogates. Matter of Kline, 65 Misc. 446; Matter of Pitou, 79 id. 384; Matter of Von Bernuth, N. Y. Law Journal, March 1, 1913, opinion quoted *post*, page 791.

An examination of the dicta of the courts indicates that this branch of the law has not yet received its final interpretation.

(3) Bank accounts in joint names

THE REPORTED DECISIONS on this subject include Matter of Wilkens, 144 App. Div. 803; Matter of Graves, 52 Misc. 433; Matter of Stebbins, *id.* 438; Matter of Kline, 65 Misc. 446; Matter of Durfee, 79 id. 655. In addition to these cases there have been opinions of the surrogates published in the New York Law Journal which have not appeared in the reports.

OPINIONS PUBLISHED IN NEW YORK LAW JOURNAL.

As the decisions appearing in the New York Law Journal are not easily accessible it seems desirable to set forth certain of them, particularly in view of the fact that they refer to the reported cases. It will be noted that reference is frequently made to cases concerning accounts in joint names which have not involved the question of the transfer tax.

IN MATTER OF CHARLES SCHROEDER, N. Y. Law Journal, March 20, 1912, an appeal from the order fixing tax was taken by the executrix upon the ground that the appraiser erred in including as part of the taxable assets of decedent's estate the sum of \$5,492.42, which was deposited in savings banks in the name of Mary Schroeder and Charles Schroeder. Decedent died prior to the 1910 amendment. Mary Schroeder was the wife of the decedent. Surrogate Cohalan in sustaining the appeal said: "The only evidence before the appraiser as to the ownership of the funds deposited in the savings banks was an affidavit by Mary Schroeder in which she alleges that the accounts were opened by her in her own name, and that the money deposited in opening the accounts was her own money; that she had her husband's name placed upon the books of deposit for the purpose of enabling him to draw any part of the money in the event of her being sick or otherwise unable to

make the withdrawal in person. This evidence is entirely insufficient to prove that the money on deposit in the savings banks belonged to the decedent. On the contrary, it shows that his name was placed upon the books not to indicate ownership of the funds, but for the purpose of convenience in drawing (Matter of Bolin, 136 N. Y. 177). The construction most favorable to the State Comptroller which could be placed upon the circumstances surrounding the openings of the account in the savings banks and the deposit of money therein would only justify a presumption of equal ownership in the fund (Matter of Wylkens, 144 App. Div. 803). This construction would reduce the amount of decedent's estate to less than \$10,000, and make it, therefore, exempt from taxation. The order fixing tax will be reversed and an order may be submitted on notice exempting the estate from taxation."

IN MATTER OF JOSEPH WUNSCH, N. Y. Law Journal, January 24, 1913, the report of the appraiser was remitted, Surrogate Fowler saying: "The affidavit submitted to the appraiser merely states that the bank accounts were held jointly by the decedent and his wife. An affidavit submitted by the executrix on this appeal shows that the bank books containing a record of the deposits bore the following inscriptions: 'Joseph Wunsch and wife, or either,' 'Joseph Wunsch and wife, either to draw,' 'Joseph Wunsch, or Magdalena Wunsch.' This affidavit also shows that all of the money so deposited belonged to the decedent. There is no evidence to show that decedent's wife knew anything about the bank deposits made by the decedent, nor is there anything to show in whose possession the bank books were kept, or whether both parties had equal access to them. Without this evidence it is impossible for the court to determine whether the decedent at the time of making the deposits intended to vest in his wife equal ownership with him in the entire deposits or whether he intended that the money should belong to him during his life and that it should become the property of his wife only in the event of her surviving him. The fact that either could draw the whole amount deposited at any time while they were both living would seem to indicate that he did not intend to make a gift *inter vivos* of the entire deposits to her (Augeburg v. Shurtliff, 180 N. Y. 146). If the gift was not completed during the life of her husband, and took effect only upon his death, it would be taxable (Matter of Pierce, 132 App. Div. 465). As the evidence before the appraiser was insufficient

to sustain the finding that the money in the various savings banks belonged to the decedent at the time of his death or was transferred to the widow as a gift intended to take effect at the death of the decedent, the order fixing tax will be reversed and the appraiser's report remitted to him for the purpose of taking additional testimony upon the points above indicated."

"THE MERE FORM OF THE ACCOUNT," said Surrogate Cohalan in *Matter of Myers*, 129 N. Y. Supp. 194, "will not be regarded as sufficient to establish an intent on the part of the person making the deposit to give the individual whose name is associated with that of the depositor on the books of the bank or trust company a joint interest in the deposit, with the right of survivorship (*Kelly v. Beers*, 194 N. Y. 49; *Matter of Bolin*, 136 N. Y. 177; *Farrelly v. Emigrant Ind. Sav. Bank*, 92 App. Div. 529; *Slee v. Kings Co. Sav. Ins.*, 78 App. Div. 534). * * *"

IN MATTER OF CAROLINE DE FOREST VON BERNUTH, N. Y. Law Journal, March 1, 1913, Surrogate Fowler discusses the question of the taxability of the interest of the survivor in a joint account the surrogate saying: "In June, 1912, the decedent and her husband deposited a sum of money with the Title Guarantee & Trust Company, and at the time of making the deposit they signed a statement declaring that they were joint owners of the money then deposited, and that any future deposits made by either of them should be their joint property, 'that is, either one of us before or after the death of the other may sign drafts or orders on said account and receive the money thereon before or after the death of the other, and at the death of either the survivor shall take absolute and single ownership of the balance then due the account.' From the affidavits submitted to the appraiser it appears that none of the husband's money was deposited in this account, but that the deposit consisted entirely of decedent's money. About five days before the death of decedent she asked her husband to draw \$15,000 from the account and to use this sum in purchasing for himself an automobile and stock securities. The husband drew the said amount of \$15,000 and placed it in his personal account. At the time of decedent's death there was a balance of \$2,034.58 on deposit in the joint account. The appraiser included this amount, together with the \$15,000 deposited in the husband's personal account, in the taxable assets of decedent's estate. The executor contends that this was error; that neither the \$2,034.58 nor the \$15,000 is subject to a transfer tax as part of decedent's estate.

"The transfer tax statute provides that a tax shall be imposed when the property is transferred by will, by the intestate laws, or as a gift given in contemplation of death or intended to take effect at or after death. If the transfer is effected in any other way it is without the statute and therefore not subject to a tax. The decisions of the courts of this State upon the question of the taxability of the interest of the survivor in a joint account are not uniform.

"In the *MATTER OF STEBBINS* (52 Misc. 538) it appeared that the money deposited belonged to the decedent, and that the deposit was made 'Julia A. and H. H. Stebbins, either or the survivor of them may draw.' It was held that the money on deposit at the death of the decedent was not subject to a transfer tax. In the *MATTER OF KLINE* (65 Misc. 446) the money was deposited in the joint names of decedent and his wife. Part of the money belonged to each at the time the deposit was made. The account was payable to either or the survivor. The court held that such portion of the money deposited as did not belong to the survivor at the time the deposit was made was taxable.

"In the *MATTER OF SPRING* (75 Misc. 586) mortgages were assigned to the decedent and her daughter by instruments which contained provisions that the survivor of the two assignees should become the absolute owner of the bonds and mortgages and that neither should have power to affect the rights of the last survivor. It was held that one-half of the value of the bonds and mortgages was taxable upon the death of the decedent. To the same effect is *MATTER OF PITOU* (reported in *New York Law Journal*, February 8, 1913; 79 Misc. 384).

"WHILE JOINT OWNERSHIP OF PERSONAL PROPERTY IS NOW RECOGNIZED by the courts (*Kelly v. Beers*, 194 N. Y. 49) and by the statute law of the State (sec. 144 of the Banking Law) the respective rights and interests of the joint owners do not seem to be definitely fixed. As a matter of fact the expression "joint owners" when applied to personal property is not definitely descriptive; it conveys no well-defined meaning as to the respective rights of the owners of the property. For instance, in the matter under consideration all the money deposited with the trust company belonged to the decedent at the time the deposit was made. As soon as the money was deposited the decedent and her husband became joint owners of it. But immediately thereafter, and while the so-called joint ownership

continued, the husband could draw the entire sum so deposited and use it for any purpose he desired. In other words, as soon as he drew it from the bank it became his individual property. It was joint property while it was in the bank; it became individual property as soon as it was drawn out. But if there was joint ownership of the deposit each of the owners would have some right to the property, and this would be inconsistent with an absolute right on the part of either to dispose of all the property. Therefore it would appear that the expression is neither accurate nor definite.

“The deposit of money under circumstances similar to those in this matter would seem to constitute not a joint ownership of the property, but a right on the part of either to draw any part of the money on deposit, with the absolute right in the survivor to the amount on deposit at the death of the other party to the arrangement. The right of the survivor to the amount on deposit is settled by authority (*Kelly v. Beers, supra*). As none of the property deposited with the trust company belonged to decedent’s husband before the deposit was made, his right to draw any part of it or to take possession of what remained after the death of his wife must have been derived either from a contract with the decedent or through a gift from her. There is no evidence of any contractual obligation assumed by the husband as a consideration for obtaining the right to draw the money deposited by the decedent. This right must therefore have been a gift from the decedent. There was not, however, a valid gift *inter vivos* of all the money on deposit, because in order to make such a gift it would be necessary that the donor should divest herself of dominion over the subject of the gift and deliver it to the donee (*Gegan v. Union Trust Co.*, 129 App. Div. 184; *aff’d* 198 N. Y. 541). But the decedent did not divest herself of dominion over the property; she reserved the right to draw all of it and use it for her own purposes. The husband had, so far as the bank was concerned, the same right as the decedent to draw all the money on deposit, and the bank could not refuse payment to him. Whether the decedent could compel him to repay to her any sum withdrawn by him from the bank would depend upon the terms of the contract or agreement entered into by the parties at the time the deposit was made. The appraiser’s report does not contain any evidence of such a contract or agreement.

“THE DECLARATION OF JOINT OWNERSHIP FILED WITH THE

BANK would justify the bank in paying the entire deposit to either the decedent or her husband, but I am inclined to think that it did not of itself divest the decedent of the right of ownership in the fund and that she did not intend by such declaration that her husband could withdraw the entire amount on deposit and use it for his own purposes. The fact that she did not make a gift of the entire amount so deposited to her husband indicates that she did not desire to relinquish her right of ownership to the property. To the right which the husband had during the lifetime of his wife to draw any part of the money from the bank was added, upon her death, the absolute right of ownership to the amount then on deposit. This latter right he did not have before and could not have until her death. It was therefore a gift intended to take effect at her death within the meaning of the transfer tax statute, and the amount on deposit in the so-called joint account at the date of decedent's death is subject to a tax.

"That the deposit was made in the particular form above described for purposes of convenience rather than with the intention of conferring the right of ownership upon the husband is apparent from the affidavit made by her husband, in which it is stated that about five days before decedent's death she asked him to draw \$15,000 from the bank and to use it in the purchase of an automobile and stock securities for himself. If it was understood between them that he had an equal right with her to the money on deposit it would not be necessary for her to authorize him to draw \$15,000 and use it for the purchase of property that was to belong to him. The \$15,000 was withdrawn from the joint account by decedent's husband before her death and was deposited by him in his personal account. It was therefore a valid gift from the decedent to her husband. While it appears that this gift was made five days before decedent's death it is alleged that at the time of making the gift she had no reason to apprehend her early demise, and as this allegation was not contradicted by the State Comptroller it cannot be held that the gift was made in contemplation of death. It is therefore exempt from taxation."

Vide MATTER OF HEISER, *post*, page 804.

IN MATTER OF VIRGINIA WALLACE, June 21, 1913, Surrogate Ketcham held: "By the order appealed from a transfer tax is imposed upon one-half of the balance in certain savings bank accounts which were opened by the appellant and the decedent

in the familiar form in their joint names. As to all of these accounts it is clear that a part of the fund which they represent belonged to the decedent at the time when the accounts were opened, and that it is impossible to distinguish the portion which she contributed to the common fund. HENCE, THE CASE IS CONTROLLED BY THE PRESUMPTION THAT EACH DEPOSITOR OWNED ONE-HALF OF THE DEPOSITS (*Wetherow v. Lord*, 41 App. Div. 413; *Matter of Kaupper*, 141 id., 54; *Matter of Wilkens*, 144 id., 803; *Matter of Pitou*, 79 Misc. 384). The decedent's one-half, therefore, passed to the appellant by a transfer which was properly taxable. The order appealed from is affirmed."

(4) Bank accounts in trust

The recent decision in *MATTHEWS v. BROOKLYN SAVINGS BANK*, 208 N. Y. 508, although not in a transfer tax matter still is pertinent as laying down a rule relative to deposits made by decedent "in trust" for another. Chief Justice Cullen in delivering the opinion of the court reversing the Appellate Division, said: "The action is to procure the adjudication that certain moneys deposited by Mary Kelly, now deceased, in The Brooklyn Savings Bank, in trust for the respondent, and not withdrawn, are owned by the respondent. The appellant asserting that they belonged to Mary Kelly at the time of her death claims them by virtue of her will.

"The following facts were found by the Special Term: On July 26, 1904, Mary Kelly deposited in the savings bank \$2,839.00 belonging to herself, and received from it a pass book in which the deposit was evidenced by the writing: 'The Brooklyn Savings Bank in account with Mary Kelly in trust for Margaret Matthews (cousin),' and the statement of the sum as a deposit. The respondent accompanied Mary Kelly to the bank on that occasion, and was present there with her while the deposit was being made and the account entered. Mary Kelly on that day delivered the pass book to the respondent for safekeeping, and the respondent then read it and knew that the deposit and account was entered as therein stated. The respondent retained possession of the pass book until about May 2, 1905, when it was redelivered to Mary Kelly, who thereafter retained possession of it until the account evidenced by it was closed. Mary Kelly, at various times beginning with August 13, 1907, down to April 23, 1910, withdrew moneys from the account, and on April 23, 1910, withdrew the whole of

the balance thereof, to wit, seventeen hundred and forty-four and thirty one-hundredths dollars, and deposited it in another account which she had with the bank, and this sum (less a small amount withdrawn by consent of all the parties) remains in the bank and is the subject of this action. The conclusions of law were, in substance, a gift was not made to the respondent, but a tentative trust was created, revocable at the will of Mary Kelly, who did revoke it by the withdrawals and redeposit, and the moneys were a part of her estate. The facts found support the conclusions of law and the judgment rendered upon them.

"The deposit was in form A TENTATIVE AND REVOCABLE TRUST. The acts of the depositor which are or can be invoked by the respondent as making it irrevocable or a completed gift, as a matter of law, are, stated generally and yet accurately, permitting the respondent to know of the deposit and its nature, and delivering the pass book to her for safekeeping. Those acts considered separately or jointly do not conclusively establish either the one or the other. (*Hemmerich v. Union Dime Savings Inst.*, 205 N. Y. 366; *Matter of Totten*, 179 N. Y. 112). The intention of the depositor and whether or not it was effectuated were questions determinable by the Special Term, from those acts and the other facts found.

"The order of the Appellate Division should be reversed and judgment of the Special Term reinstated, with costs to appellant in both courts."

WHERE TRANSFER NOT ABSOLUTE.

IN MATTER OF HENRY I. BARBEY, 114 N. Y. Supp. 725, the money deposited by the decedent in savings banks in form "in trust" for his several children was his own property. Surrogate Thomas held that "no contract obligation with relation to such deposits existed. No absolute transfers to the trust beneficiaries, by delivery of the bank books or otherwise was shown; and it is not claimed that the fact of the deposits was made known by the decedent to the beneficiaries, or any of them. Upon these facts the depositor retained a power to revoke the trusts at his pleasure by making withdrawals of money for his own use, and the rights of the beneficiaries are restricted to the balances remaining at his death. *Matter of Totten*, 179 N. Y. 112, 71 N. E. 748, 70 L. R. A. 711.

"The depositor is also presumed to have intended that each trust shall come to an end and that the fund shall revert to his estate if the beneficiary does not survive him. *Matter of U. S.*

Trust Co., 117 App. Div. 178, 102 N. Y. Supp. 271, affirmed, 189 N. Y. 500, 81 N. E. 1177. In other words the decedent reserved to himself all of the rights of ownership in the deposits until his death, and granted only interests "intended to take effect in possession or enjoyment at or after such death." Such interests are identical with those passing by a will. The transfers are within the purpose and express language of the statute and they are taxable. *Matter of Green*, 153 N. Y. 223, 47 N. E. 292; *Matter of Brandreth*, 169 N. Y. 437, 62 N. E. 563, 58 L. R. A. 148, reversing 58 App. Div. 575, 69 N. Y. Supp. 142; *Matter of Cornell*, 170 N. Y. 423, 63 N. E. 445, modifying 66 App. Div. 162, 73 N. Y. Supp. 32; *Matter of Bostwick*, 160 N. Y. 489, 55 N. E. 208; *Matter of Skinner*, 45 Misc. Rep. 559, 92 N. Y. Supp. 972; *Matter of Sharer*, 36 Misc. Rep. 502, 73 N. Y. Supp. 1057."

ABSOLUTE AND IRREVOCABLE TRUST.

IN *MATTER OF PIERCE*, 132 App. Div. 465 (Fourth Department), reversing 60 Misc. 25, it was held that savings bank accounts in name of decedent as trustee for a particular person named, were under the circumstances set forth in opinion of court, completed and irrevocable gifts during lifetime of decedent and therefore not taxable.

(5) Delivery of bank book to *cestui que trust*

IN *MATTER OF MATTHEW FARRELL*, N. Y. Law Journal, January 3, 1912, Surrogate Fowler held: "Decedent some years before his death deposited money in various savings banks in trust for his children. The deposits for each child were made in the following form: 'Matthew Farrell in trust for son Francis Farrell.' The decedent died on the 23d day of February, 1910. On the 15th of February, 1910, he asked his son to get him the bank books, in which were recorded the various deposits made by him in trust for his children. After receiving them he gave to each of the children the bank book containing a record of the deposits made for his or her benefit. All the bank books were then given to a son of decedent for safekeeping, and were subsequently deposited by him in the safe deposit box rented by the decedent. The bank books remained in the safe deposit box until the death of the decedent.

"The appraiser included in the taxable assets of decedent's estate the amounts deposited by the decedent for the *cestuis que trustent*, as shown by the different bank books. The ad-

ministrator appeals from the order fixing tax, alleging that these deposits were not taxable. The deposit by the decedent of his own money in trust for his children constituted a revocable trust until some unequivocal act on his part showed that he desired the gift to become absolute. The unequivocal act was the delivery of the bank books to the *cestuis que trustent* (Matter of Totten, 179 N. Y. 112). The delivery of the bank books to the *cestuis que trustent* constituted a valid gift *inter vivos* by the decedent to his children, and such a gift is not taxable (Matter of Spaulding, 49 App. Div. 541; *aff'd* 163 N. Y. 607; Matter of Pierce, 132 App. Div. 464), unless it is made in contemplation of death (subdiv. 4, sec. 220 of the Transfer Tax Law).

"THE BURDEN OF PROOF was upon the State Comptroller to show that the gift was made in contemplation of death (Matter of Palmer, 117 App. Div. 360); and as the only evidence adduced before the appraiser showed that the decedent at the time he consummated the gift by delivery of the bank books was in his usual condition of reasonably good health and that nothing had transpired to indicate that he contemplated his dissolution in the immediate future, the burden was not sustained by the State Comptroller."

(6) Delivery of the bank book will not in itself make trust irrevocable

IN MATTER OF HALLIGAN, 82 Misc. 30, Surrogate Cohalan held: "The decedent died on the 9th day of September, 1912, a resident of this State. At various times prior to the date of his death he opened accounts with savings banks in this city, the caption of each account being 'James Halligan, in trust for Elizabeth A. Halligan.' The transfer tax appraiser found that the entire amount remaining on deposit with these banks at the date of decedent's death was the sum of \$27,517. He included this amount in the taxable assets of decedent's estate. From the order entered upon his report the executrix has taken this appeal.

"Elizabeth A. Halligan, the executrix herein, was the wife of the decedent. She claims that the \$27,517 deposited in the name of the decedent in trust for her was her individual property, having been given to her by the decedent as a gift *inter vivos*. The affidavits submitted to the appraiser on behalf of the estate allege that the decedent consulted with his wife before opening

the accounts in the various savings banks, and that in some instances she went with him to the banks at the time the accounts were opened; that the decedent handed over to her the savings bank books showing the deposits made in the banks, and that she had possession of these books 'at our place of residence' at the time of decedent's death.

"In order to constitute a valid gift *inter vivos* there must be a delivery to the donee of the thing constituting the gift, coupled with an intention on the part of the donor to transfer to the donee the right of ownership in and dominion over the property (Beaver *v.* Beaver, 117 N. Y. 421; Gannon *v.* McGuire, 160 N. Y. 476; Hemmerick *v.* Union Dime Sav. Bank, 205 N. Y. 366).

"It is conceded that all the money deposited by the decedent as trustee for his wife belonged to him. The affidavits submitted to the appraiser on behalf of the estate do not allege that the decedent told his wife at the time he made the deposits that he was giving the money to her, nor do they allege that he said anything about a gift when he gave her the bank books. There is no allegation that the decedent gave the money deposited in the various banks as a gift to his wife. The circumstances surrounding the deposit and the possession of the books by the decedent's wife are entirely consistent with the assumption that the deposit was made in the name of decedent in trust for his wife as a matter of convenience, and that the books were given to her for the purpose of safe-keeping (Matter of Bolin, 136 N. Y. 177; Kelly *v.* Beers, 194 N. Y. 49). * * * But delivery of the passbook will not in itself make the trust irrevocable; there must be words of gift or a declaration that the depositor is thereby giving to the cestui que trust the money to the credit of the depositor in the bank which issued the pass book (Matthews *v.* Brooklyn Savings Bank, 208 N. Y. 508). As the decedent did not make a valid gift *inter vivos* of the money deposited in trust for his wife, and the trust was not irrevocable until the death of the decedent, the property passed to her as a gift intended to take effect at or after death, and is therefore subject to a tax (Matter of Kline, 65 Misc. 446; Matter of Von Bernuth, N. Y. Law Journal, March 1, 1913)."

(7) Where moneys forming the account do not belong to decedent

Bank accounts in name of decedent in trust for one May

Goodrich were held to be her property and not taxable in *MATTER OF CHARLES H. HARRIOTT*, N. Y. Law Journal, March 1, 1913. Surrogate Fowler said: "The bank books were at the time of decedent's death in a safe deposit box of John H. Scofield, because neither the decedent nor said May Goodrich had a safe deposit box.

"The testimony of May Goodrich before the appraiser was that she gave to the decedent to deposit in said accounts at various times money received by her from different sources during the term of her employment by decedent, a period of thirteen years. It also appears that she exercised some control over the accounts, inasmuch as she drew money from one of them, and at her suggestion, the decedent drew money from another and gave it to her for her own use. These facts are corroborated in part by her own affidavit made prior to the hearing before the appraiser and the affidavit of said John H. Scofield, who was the executor of decedent's will, forming a part of the appraiser's report. There is no doubt, therefore, that said May Goodrich proved that the money making up the accounts belonged to her, and that the accounts were opened by the decedent with her knowledge and approval.

"In the *Matter of Totten*, 179 N. Y. 112, the rule governing title to trust accounts in savings bank was laid down as follows: 'A deposit by one person in his own name, as trustee for another, standing alone does not establish an irrevocable trust during the lifetime of the testator. It is a tentative trust merely, revocable at will, until the depositor dies or completes the gift in his lifetime by some equivalent act or declaration, such as the delivery of the pass book or notice to the beneficiary. In case the depositor dies before the beneficiary, without revocation or some decisive act or declaration of disaffirmance, the presumption arises that an absolute trust was created as to the balance on hand at the death of the testator.'

"Applying this rule to the case under consideration we find that the decedent opened the accounts with the full knowledge and approval of the claimant; that the bank books were in the possession of a mutual friend, and that the moneys forming the accounts belonged to the claimant and to no other person. Taking all these circumstances into consideration, the conclusion is the money represented by these three bank accounts did not form a part of the estate of decedent, but belonged absolutely to May Goodrich."

(8) Money deposited by wife in trust for her husband, she retaining possession of bank book, is taxable upon her death

IN MATTER OF ANNA QUINN, N. Y. Law Journal, November 25, 1911, Surrogate Fowler held: "This appeal is taken by the administrator from an order assessing a tax upon the estate of decedent. At the time of decedent's death she had in her possession two bonds and mortgages which were executed by the mortgagors to James and Anna Quinn, as mortgagees. James Quinn was the husband of decedent. She had also certain savings bank books which bore on their respective title pages the following: 'Anna Quinn, for her husband, James,' 'Anna Quinn, in trust for James Quinn,' and 'Anna Quinn, in trust for James Quinn, her husband.' Besides these the decedent had certain bank books which contained a record of deposits made by her in her own name and for her own account.

"The appraiser included in the taxable assets of decedent's estate one-half of the value of the bonds and mortgages of which the decedent and her husband were the mortgagees. He also included the amount of money which was deposited in the different savings banks in the name of the decedent individually, as well as the amounts in the various banks in the name of decedent in trust for her husband. THE ADMINISTRATOR CONTENTS that the decedent and her husband had an estate by the entirety in the bonds and mortgages, and that therefore they passed to the survivor. He also contends that the deposits in the savings banks in the name of Anna Quinn, individually, were made by her as agent of her husband; that the money was his property and that it should not be included as part of decedent's estate. He also contends that the deposits in savings banks which were made by the decedent in trust for her husband consisted of moneys belonging to her husband, and that the appraiser erred in including them as part of the assets of decedent's estate. The decedent was survived by her husband. He died before proceedings were brought to determine the value of the taxable assets of decedent's estate, and it was therefore impossible to obtain that direct evidence as to the ownership of the funds invested in the bonds and mortgages, as well as of the money deposited in the savings banks in the name of the decedent in trust for her husband, which is so necessary to a proper adjudication of the question in dispute. The testimony taken before the appraiser shows that decedent's husband was illiterate and unable to sign his name; that he and

his wife were very poor before he started in business as a contractor; that his wife took an active interest in the conduct of the business, made up his accounts and did all his bookkeeping.

"The deposit of money in the different savings banks in the name of the decedent raises a presumption that the money so deposited belonged to her, and this presumption is not rebutted or overcome by the testimony taken before the appraiser. While the decedent was not entitled as a matter of law to any compensation for services rendered by her to her husband in the conduct of his business (*Matter of Callister*, 153 N. Y. 294), it is not at all improbable that he, in consideration of the active interest which she took in the management of his business and the material assistance which she rendered him, gave her from time to time a part of the profits accruing from the successful enterprises in which he was engaged, and that she deposited such money in her own name in the savings bank. However she may have obtained the money, the fact that she deposited it in the various savings banks in her own name would indicate that she was the owner of it, and the appraiser was therefore correct in including in the taxable assets of decedent's estate all the money deposited in savings banks in her name. As she had individual property or money which she could deposit in her own name in a savings bank, it follows that she could also invest this money in any form of investment, such as bonds and mortgages, with her husband.

(9) Bond and mortgage executed to a husband and wife as mortgagees

"The absence of any evidence as to the ownership of the money invested in the purchase of the bonds and mortgages, and the further absence of any evidence as to the custody of the instruments themselves during the life of the decedent, leaves the determination of the question of decedent's interest in the bonds and mortgages to the presumptions which may reasonably be indulged in as to the intent of the parties when purchasing the bonds and mortgages. Assuming from the savings bank deposits made by the decedent in her individual name that she was possessed of considerable money, the court will, in the absence of proof that the money invested in the bonds and mortgages was owned exclusively by the husband, presume that the investment was made with money contributed by the decedent

and her husband, and that they were tenants in common of the securities purchased with the funds so contributed by each of them. *Wethrow v. Lord*, 41 App. Div. 413; *Matter of Albrecht*, 136 N. Y. 91; *Matter of Baum*, 121 App. Div. 496.

"There is no evidence as to the ownership of the money deposited in the savings banks in the name of decedent in trust for her husband, and in the absence of such evidence the presumption is that the money belonged to her. It appears, however, that the bank books were kept by the decedent, and that possession of them was not surrendered to her husband during her life. This constituted a tentative trust which remained revocable during the life of the decedent and became absolute only upon her death. *Matter of Totten*, 179 N. Y. 112. The money therefore passed to her husband upon the death of the decedent as a gift intended to take effect at or after death under subdivision 4, section 220, of the Transfer Tax Law. Order fixing tax affirmed."

(10) Mortgages assigned to decedent and her daughter with right of survivorship

IN *MATTER OF SPRING*, 75 Misc. 586 (1912), the appraiser held that a half interest in certain mortgages was subject to the transfer tax. Surrogate Ketcham in sustaining the appraiser said: "These mortgages were assigned to the decedent and her daughter, by instruments which contained provisions, in some instances, that the survivor of the two assignees should become the absolute owner of the bond and mortgage and that neither should have the power to affect the rights of the last survivor, and, in other instances, that the securities assigned would be held by the parties of the second part and the survivor of them.

"The executrix claims that the transfer to these two persons jointly, with right of survivorship, vested the title in the survivor and that, on the death of one, the title of the survivor related back to the date of the original transfer.

"It is of no importance to consider whether or not these transfers bestowed title or ownership at the time when the mortgages were assigned.

"If the claim of the executrix in this respect were conceded the transfers would, nevertheless, be taxable under the expressions of the statute.

"It is apparent that the decedent, under the several assign-

ments, received a right, at least equal to that of her associate assignee, to collect interest upon the mortgages. While it does not affirmatively appear, the presumption must be that each of the assignees reserved the right to interest on one-half of the investment. Hence, as to the one-half of the securities involved in this discussion, the decedent held an interest which can be likened to an intermediate estate for her own life; and the daughter (the other assignee) took a remainder which, under the language of the Tax Law, was a transfer 'intended to take effect in possession or enjoyment' upon the death of the decedent. *Matter of Green*, 153 N. Y. 223; *Matter of Brandreth*, 169 id. 437; *Matter of Cornell*, 170 id. 423; *Matter of Keeney*, 194 id. 281."

(11) In absence of proof there is presumption of equal ownership

IN *MATTER OF PITOU*, 79 Misc. 384 (1913), Surrogate Ket-cham discusses the question, and cites with approval *Matter of Kline*, 65 Misc. 446.

(12) Joint ownership of personal property

IN *MATTER OF SARAH HEISER*, N. Y. Law Journal, July 19, 1913, Surrogate Fowler held: "This appeal is taken by the State Comptroller from an order assessing a tax upon the estate of the decedent. The appraiser reported that real estate of the value of \$45,800 and personal property consisting of bonds and mortgages of the value of \$156,166.69 were held by the decedent and her sister, Maria S. Heiser, as joint tenants, and that the decedent's interest in the property was exempt from taxation.

"The State Comptroller contends that the decedent's interest in this property passed to the executrix, who was her joint tenant, as a gift intended to take effect at or after death and that it is therefore subject to a transfer tax.

"The decedent and her sister, Maria S. Heiser, were originally tenants in common of the real estate. They conveyed it to a third person, and in the deed by which it was reconveyed to them it was expressly declared that the conveyance was made to them as joint tenants and not as tenants in common. The bonds and mortgages were originally held by the decedent and her sister, Maria S. Heiser, as tenants in common, but by separate instruments they were assigned to a third person, and then

assigned and transferred by such third person to the decedent and her sister as joint tenants.

"JOINT OWNERSHIP OF PERSONAL PROPERTY is recognized by the law of this State. *Matter of Kaupper*, 141 App. Div. 54; *Kelly v. Beers*, 194 N. Y. 49. The right of the survivor to the entire property held by them as joint tenants is the distinguishing characteristic of this species of ownership, and if all the property held jointly belonged originally to one of the parties and the rights of a joint owner were conferred by the original owner upon his joint tenant as a gift intended to take effect at or after death, the value of the interest passing to the survivor would be subject to the provisions of the Transfer Tax Law.

"But if the joint tenants have contributed out of their individual funds to the purchase of the property held by them as joint tenants, the right of the survivor to take the entire property is not a gift from the other joint tenant, but a right derived from the contract entered into between them at the time the instrument creating the joint tenancy was executed. A contract by which each of two persons holding property as tenants in common transfers his interest therein to the other if he survives is supported by a good consideration and is not subject to revocation. *Augsbury v. Shurtleff*, 180 N. Y., p. 147.

"When the decedent and her sister as tenants in common of the bonds and mortgages mentioned in the appraiser's report agreed with each other to transform the nature of their tenancy in the property from tenants in common to joint tenants, each of them surrendered rights over the property in consideration of the right of survivorship conferred by the instrument creating the joint tenancy. Instead of each owning an undivided one-half of the property, subject to sale, assignment or to transfer by will, each took under the instrument creating the joint tenancy an undivided half which was not subject to sale, assignment or to transfer by will. Each, therefore, parted with a valuable consideration for the right to take the entire property as survivor.

"IN THE TESTIMONY GIVEN BEFORE THE APPRAISER by Maria S. Heiser, the surviving joint tenant, she testified that the execution of the instrument, by virtue of which they held the property as joint tenants, was 'for the purpose of facilitating the administration of the estate when one should die, so that the survivor would take what was left as a gift.' As there is

no ambiguity in the instrument creating the joint tenancy this testimony as to its effect was incompetent.

"IN THE ABSENCE OF AN ALLEGATION OF FRAUD, it is immaterial what purpose the parties to the instrument may have intended to accomplish by its execution, because the instrument itself expressly declares that the assignment of the bonds and mortgages was made to them as joint tenants. The right of the survivor to take the entire property may accord with the witness' conception of a gift, but it was not a gift within the legal signification of that word. It was not a gift *inter vivos* because there was no delivery by the donor of the thing constituting the gift, coupled with an intention to transfer the immediate right of ownership in and dominion over the property to the donee. Matter of Bolin, 136 N. Y. 177; Beaver v. Beaver, 117 N. Y. 421. It was not a gift *causa mortis*, because real property cannot be the subject of such a gift, and it does not appear that either of the parties to the instrument creating the joint tenancy was *in extremis* or dangerously ill or in immediate peril of losing her life. Neither was it a gift made in contemplation of death within the meaning of that phrase in the transfer tax statute, because it was made for a valuable consideration and was contingent in each case upon either one of the joint tenants surviving the other.

"It was also suggested before the transfer tax appraiser that the joint tenancy was created for the purpose of avoiding taxation under the Transfer Tax Law. IT IS IMMATERIAL FOR WHAT PURPOSE THE JOINT TENANCY WAS CREATED, as property may be transferred by gift *inter vivos* or for a valuable consideration and not be subject to the provisions of the Transfer Tax Law. It is only when it is transferred in the particular manner prescribed by the transfer tax statute that it is subject to the tax. A transfer effected in any other form, irrespective of the motive which prompted it, is not subject to the tax.

"As the TRANSFER TAX STATUTE DOES NOT IMPOSE A TAX UPON A TRANSFER OF PROPERTY WHICH IS MADE FOR A VALUABLE CONSIDERATION, and as it appears that the transfer of the interest of the decedent in the bonds and mortgages as well as the real estate above mentioned was for a valuable consideration, the interest accruing to the survivor upon the death of the decedent is not subject to the provisions of the Transfer Tax Law. The order fixing tax will therefore be affirmed."

Vide Matter of Von Bernuth, *supra*, page 791, and cases therein cited.

PRO RATA

As to pro rata distribution in non-resident estates under subdivision 3 of § 220 vide *supra*, page 150.

For deductions of debts and expenses in non-resident estate vide *supra*, page 157.

The exemption to beneficiary under § 221a is prorated where the beneficiary is entitled to both a legacy presently payable and a remainder interest in a trust fund. Matter of Title Guarantee & Trust Co., 81 Misc. 106.

PUBLIC ADMINISTRATOR

Where public administrator has obtained letters of administration and there is uncertainty as to whether the deceased left next of kin, the tax is imposed at highest rate. Matter of Lind, 132 App. Div. 321, affirmed, without opinion, 196 N. Y. 570, *supra*, page 369.

PUNISHMENT FOR CONTEMPT

Vide Contempt.

QUARANTINE, WIDOW'S

Vide Matter of Stiles, 64 Misc. 558-662, and § 204, Real Property Law, quoted sub Wife *supra*, page 888.

QUASI JUDICIAL OFFICER

"The powers and duties of the tax appraisers are of a *quasi* judicial character." People ex rel. McKnight v. Glynn, 56 Misc. 35-39; Matter of Ullmann, 137 N. Y. 403-407, and cases cited sub Appraiser.

QUESTIONS OF FACT

Appeal to Court of Appeals limited to a review of questions of law, vide Appeal.

Valuation of stock is a question of fact. Matter of Thayer, 193 N. Y. 430-433.

RATES OF TAX

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| (1) Rates under present statute. | (3) Transfers under subdivision 4 |
| (2) Rates under previous statutes. | of § 220. |
| | (4) Remainders. |

(1) Rates under present statute

The rates of tax under the present statute have remained unchanged since the amendment by LAWS OF 1911, CHAP. 732, *supra*, page 526, in effect July 21, 1911. For tables and discussion vide page 43.

As to taxation at HIGHEST RATE under sixth paragraph of § 230 vide footnote to Matter of Brez, *supra*, page 273, and cases cited sub REMAINDERS; etiam Matter of Eaton, 55 Misc. 472.

The decisions under the Laws of 1911, chap. 732 include Matter of Schwarz, 209 N. Y. mem., *supra*, page 399, overruling Matter of Elletson, 75 Misc. 582; Matter of Kip, N. Y. Law Journal, March 28, 1912, opinion quoted *supra*, page 400; Matter of Eaton, 79 Misc. 69; Matter of Title Guarantee & Trust Co., 81 Misc. 106-112.

(2) Rates under previous statutes

The amount of the tax is controlled by the statute in existence at the time of the transfer. Matter of Abraham, 151 App. Div. 441-442 and cases cited *supra*, page 54.

LAWS 1910, CHAP. 706: vide *supra*, page 43 and page 520; Matter of Jourdan, 206 N. Y. 653, *supra*, page 386; Matter of Scott, 208 N. Y. 602, *supra*, page 396; Matter of Hogg, 156 App. Div. 301.

IN MATTER OF ANNA C. HOLT, N. Y. Law Journal, March 16, 1912, Surrogate Fowler held: "Chapter 732 of the Laws of 1911, which went into effect July 21, 1911, is not retroactive (Matter of Niles, N. Y. Law Jour., Jan. 5, 1912). As the decedent died in June, 1911, the taxation of the transfer of property effected by her will is governed by chapter 706 of the Laws of 1910 (Matter of Sloan, 154 N. Y. 109). This law provided that \$500 of the amount transferred to an adult child of decedent should be exempt from taxation; therefore the appraiser was correct in deducting this sum from the net amount of each legatee's share."

Vide Matter of Mason, 69 Misc. 280, and opinion of state comptroller, January 27, 1913, 1 State Department Reports, 559.

THE HOUR OF THE DAY upon which chapter 706 of the Laws of 1910 took effect was involved in *Matter of Lane*, 157 App. Div. 694. The court held, page 697, that the amendment "did not take effect until after the death of the testatrix, which happened on the same day upon which the statute was passed and took effect." An examination of the printed papers on appeal shows at folio 127 thereof that the attorney for the state comptroller and the attorneys for the executor entered into a stipulation "for the purpose of this proceeding" to the effect that chapter 706 of the Laws of 1910 "was approved by the Governor of the State of New York, between the hours of five o'clock and forty minutes and six o'clock in the afternoon of the 11th day of July 1910."

As to fractions of days vide *Matter of Dreyfous*, 18 N. Y. Supp. 767; *Ottman v. Hoffman*, 7 Misc. 714; *Town of Louisville v. Portsmouth Savings Bank*, 104 U. S. 469; *Matter of Richardson*, 2 Story 571; *Burges v. Salmon*, 97 U. S. 381; *Taylor v. Brown*, 147 id. 640-645; *Croveno v. Atlantic Avenue R. R. Co.*, 150 N. Y. 225-229.

LAWS 1909, CHAP. 62, *supra*, page 500.

LAWS 1905, CHAP. 368, *supra*, page 474.

LAWS 1903, CHAP. 41. *Matter of Fisher*, 96 App. Div. 133; *Matter of Hallock*, 42 Misc. 473.

LAWS 1897, CHAP. 284, *supra*, page 450. *Matter of Seaver*, 63 App. Div. 283.

LAWS 1896, CHAP. 908, *supra*, page 437. *Matter of Corbett*, 171 N. Y. 516, *supra*, page 264; *Matter of Garland*, 88 App. Div. 380; *Matter of DeGraaf*, 24 Misc. 147.

LAWS 1892, CHAP. 399, *supra*, page 424. *Matter of Hoffman*, 143 N. Y. 327, *supra*, page 189; *Matter of Costello*, 189 id. 288, *supra*, page 344; *Matter of Hall*, 88 Hun, 68; *Matter of McMurray*, 96 App. Div. 128.

LAWS 1887, CHAP. 713, *supra*, page 413. *Matter of Sherwell*, 125 N. Y. 376, *supra*, page 168.

LAWS 1885, CHAP. 483, *supra*, page 404. *Matter of Cager*, 111 N. Y. 344; *Matter of Howe*, 112 N. Y. 100.

(3) Transfers under subd. 4 of § 220

IN *MATTER OF WEBBER*, 151 App. Div. 539, held, that where donor made and delivered a trust deed by which she reserved the income to herself, with no power of revocation, that upon her death the property was taxable at the rate of tax under the

law in effect at the time of the making and delivery of the trust deed and not the rate in effect at the date of her death.

IN MATTER OF ATTERBURY, N. Y. Law Journal, March 25, 1913, Surrogate Cohalan held that the law in existence at the time of the transfer of the property by deed of trust is the law which governs the rate of tax and not the law in existence at the time of the death of the decedent. Opinion quoted sub Trust Deed, *post*, page 871.

IN MATTER OF LOEWI, 75 Misc. 57, Surrogate Fowler said at page 62: " * * * It is, therefore, unnecessary in this proceeding to determine whether the decedent constituted his son, Joseph Loewi, a trustee of the bonds which were in the safe deposit vault, to pay the income to him during his life and upon his death to distribute the *corpus* among his children, as, whether the property passed to the beneficiaries by virtue of such a gift intended to take effect at or after decedent's death, or whether it passed by virtue of decedent's will, so long as the property did not pass as a valid gift *inter vivos*, its transfer is taxable at its full value at the date of decedent's death. Matter of Cornell, 170 N. Y. 423; Matter of Green, 153 id. 223, and at the rate prescribed by the statute in existence at the date of decedent death. Matter of Davis, 149 N. Y. 539."

Vide MATTER OF AGNEW, N. Y. Law Journal, December 13, 1913, *supra*, page 53, as to transfers by both deed of trust and by will to same beneficiaries.

(4) Remainders

Where tax on remainder is imposed on death of life tenant, the provisions of law in effect at death of testator and not those in effect at death of life tenant "must control as to the subject and rate of taxation." Matter of Davis, 149 N. Y. 539-545.

For discussion of tax upon remainders vide, *post*, page 817.

REAL ESTATE

Should be set forth in Schedule A¹ *supra*, page 97.

APPRAISAL by expert, page 98.

ASSESSED VALUE of real estate, page 100.

BLANKET MORTGAGES, page 659.

CERTIFICATE under § 236, page 97.

CONTRACT OF SALE of foreign real estate, page 97.

DECEDENT ESTATE LAW, § 122, page 113.

DEVOLUTION of title, page 102.

DOWER, pages 102 and 671.

FOREIGN REAL ESTATE not taxable, page 97.

JOINT TENANCY, page 788.

MORTGAGES on decedent's real estate should be set forth in Schedule A¹, page 101. Mortgages held by decedent in Schedule A³, page 109.

RENT reserved to deceased and accrued and unpaid at time of his death should be set forth in Schedule A¹, page 98. Rent on unexpired lease, vide Schedule B³, page 132.

TAXES, page 101.

Vide Leasehold; Lien of Tax; Tenants by the Entirety.

In resident estates transfers of New York real estate to "collaterals" have been taxable since the first act of June 30, 1885, but it was not until March 16, 1903, that transfers of New York real estate to "lineals" were made taxable by chap. 41, Laws 1903. Matter of Fisher, 96 App. Div. 133-135. The same condition exists in non-resident estates except that non-resident estates were not subject to tax until June 25, 1887, chap. 713, Laws 1887. Matter of Enston, 113 N. Y. 174; Matter of Romaine, 127 id. 80. Quite naturally in the earlier cases it became important to determine whether mortgages upon real property should be deducted from the personal estate of the decedent. It was held not. Vide Matter of Livingston, 1 App. Div. 568, and other cases cited under Deductions, *supra*, page 659; etiam Equitable Conversion, *supra*, page 682. As to partnership real estate vide Partnership, *supra*, page 752.

"In practice if a person who is a resident of this state dies seized of real estate the appraiser does not personally appraise the property, but accepts the evidence of some one qualified to appraise real estate." MATTER OF CORA F. BARNES, N. Y. Law Journal, December 17, 1913.

An administrator paid from the personal estate the transfer tax upon the real estate of which decedent died seized. There were unpaid creditors who had a right to payment of their claims from the personal estate, and therefore the money paid from the personal estate for the transfer tax upon the real property rightfully belonged to the creditors. When the real estate came to be sold in a partition suit the court directed that there be set aside from the proceeds of the sale a sum equal to the amount of the transfer tax so paid, and that this sum be

paid by the administrator to the creditors. *Hughes v. Golden*, 44 Misc. 128.

SALE PRIOR TO APPRAISAL overcomes testimony of expert "where the evidence is that diligent efforts had been made to sell the property and the price at which it was sold was the best that could be obtained." *Matter of Arnold*, 114 App. Div. 244-246.

SURROGATE'S DECREE FIXING VALUE OF REAL PROPERTY WILL NOT BE MODIFIED because the real property sells for a less sum. "A practice which would permit judgments fixing values to be opened from time to time in cases where a subsequent sale of the appraised property tended to show that the figure fixed by the judgment was too large or too small, would lead to intolerable uncertainty and confusion." *Matter of Lowry*, 89 App. Div. 226-229.

In *Matter of Mary R. Meyer*, N. Y. Law Journal, January 28, 1913, affirmed, 209 N. Y. 386, *supra*, page 397, Surrogate Cohalan held, that "The value of decedent's interest in real estate having been fixed by the transfer tax appraiser in accordance with the evidence submitted in 1909 by the executor of the estate, the fact that the property was sold in 1912 for less than the amount of such appraisal does not justify the surrogate in modifying the order assessing a tax upon the basis of the original appraisal (*Matter of Lowry*, 89 App. Div. 226; *Matter of Barnum*, 129 App. Div. 418)."

In **NON-RESIDENT** estates the disposition of New York real estate is regulated by the laws of this state. Decedent Estate Law, § 47, *supra*, page 547; *Matter of Turner*, 82 Misc. 25-28.

EXECUTOR AUTHORIZED TO SELL REAL ESTATE TO PAY TAX. In reply to an enquiry of the surrogate of Chemung County the comptroller gave the following opinion, dated April 16, 1913, 2 State Department Reports, 498: "The Tax Law provides for the appraisal of both real and personal property in the one proceeding and the amount of the tax is to be fixed and determined by the one taxing order of the surrogate. Therefore it is the duty of the executor to see that property specifically bequeathed or devised is appraised, as well as the general assets of the estate.

"Section 224 of the Tax Law refers particularly to the lien of the tax and the collection thereof by executors, administrators and trustees. A part of this section reads as follows:

" * * * 'If such legacy or property be not in money, he

(referring to the executor, administrator or trustee) shall collect the tax thereon upon the appraised value thereof *from the person entitled thereto.*'

"It would seem from this provision that when a will devises real estate direct to a son the executor's duty to the state is to collect the tax from the son. It is true the statute does not prescribe the manner in which the executor is to proceed to collect the tax where the property transferred is not in cash and the legatee or devisee refuses to pay the tax, unless such direction may possibly be contained in another paragraph of this section of the Tax Law, which reads as follows:

"* * * 'Every executor, administrator or trustee shall have full power to sell so much of the property of the decedent as will enable him to pay such tax in the same manner as he might be entitled by law to do for the payment of the debts of the testator or intestate.'

"This provision would seem broad enough to authorize the executor to institute proceedings to sell the real estate upon which the tax was a lien, in the same manner as he would to pay the debts of the decedent where the personal property of the decedent was insufficient for that purpose.

"The fact that the statute intended the executor to collect all the tax as assessed upon the various transfers is further evidenced by the provision in section 236 of the Tax Law, stating:

"* * * ; 'but no executor, administrator or trustee shall be entitled to a final accounting of an estate in settlement of which a tax is due under the provisions of this article unless he shall produce a receipt so sealed and countersigned, or a certified copy thereof.'"

REAL ESTATE CORPORATION

Vide Schedule A⁴ at page 117.

REAL PROPERTY LAW

Section 250 of Real Property Law, it seems, is not, so far as direction to pay mortgages out of personal estate is concerned, to be read with Transfer Tax Law. *Matter of Berry*, 23 Misc. 230; vide etiam cases cited *Deductions*, page 659.

Section 151 of Real Property Law applied in *Matter of Lynn*, 34 Misc. 681.

In estate where widow is not entitled to both dower and the

provisions made for her benefit in the will it is error for the appraiser to allow deduction for dower unless widow has elected to take her dower under § 201 of the Real Property Law. *Matter of Stuyvesant*, 72 Misc. 295, and cases cited sub Dower.

Section 204 relating to widow's quarantine, vide *Wife, supra*, page 888.

REAPPRAISAL

"Within two years after the entry of an order or decree of a surrogate determining the value of an estate and assessing the tax thereon, the state comptroller may, if he believes that such appraisal, assessment or determination has been fraudulently, collusively or erroneously made, make application to a justice of the supreme court of the judicial district embracing the surrogate's court in which the order or decree has been filed, for a reappraisal thereof." Section 232.

NOTICE is not required to be given upon an application for order of reappraisal. *Matter of Elizabeth H. Smith*, 40 App. Div. 480-482; vide same estate reported in 71 App. Div. 602. It was also held that the Supreme Court had no authority to vacate an order for reappraisal granted under § 232. *Matter of Smith*, 40 App. Div. 480.

Reappraisal is not the only method of review; appeal may be taken under § 2570 of Code of Civil Procedure. *Morgan v. Warner*, 45 App. Div. 424-426, affirmed, on opinion below, 162 N. Y. 612, *supra*, page 237. Vide *Vacating Decree*.

Application to Supreme Court under § 232 for reappraisal denied because only errors of fact were intended to be embraced by the reappraisal provisions of § 232, and the application for reappraisal was "based upon what was emphatically an error of law." *Matter of Niven*, 29 Misc. 550.

Where property of decedent brought to the attention of appraiser, and he has held that it was not subject to the tax, surrogate cannot several years after an order confirming report of appraiser make an order directing an appraisal of assets which were held not taxable under original order. *Matter of Crerar*, 56 App. Div. 479.

Where an appraiser is appointed to appraise property not included in a former appraisal, he is limited to the newly discovered property, and cannot reappraise the estate included in former report and order. *Matter of Rice*, 56 App. Div. 253.

THE REPORT OF APPRAISER IS REMITTED, quite frequently,

for additional information or reappraisal. Vide *Matter of Caroline W. Astor*, 137 App. Div. 922, opinion of Surrogate quoted *supra*, page 107.

RECALCITRANT WITNESS

Vide Contempt.

RECEIPTS FOR TAX

Receipts issued as provided by the last sentence of § 222 and the first paragraph of § 236. Vide *Payment of Tax*.

As to production of receipt on final accounting in pursuance of the provisions of the second sentence of § 236, vide *Matter of Meyer*, 209 N. Y. 386, *supra*, page 397.

For recent discussion as to who is the proper official to issue receipts vide *People ex rel. Lown v. Cook*, 158 App. Div. 74, affirmed, without opinion, 209 N. Y. mem.

REDUCTION OF PENALTY

Vide Interest.

REFEREE

Surrogate may appoint a referee under § 2546 of Code of Civil Procedure. *Matter of Bishop*, 111 App. Div. 545-547, appeal dismissed, 188 N. Y. 635, *supra*, page 343; *Matter of Cora F. Barnes*, N. Y. Law Journal, December 17, 1913.

REFUND

"IF THE REMAINDER ULTIMATELY VESTS IN PERSONS TAXABLE AT A LOWER RATE or a person or corporation exempt from taxation by the provisions of this article, the state comptroller or the county treasurer shall refund any excess of tax so held by him to the executor or trustee of the estate, to be disposed of by said executor or trustee as provided by the decedent's will." Second paragraph of § 241. Vide opinion of state comptroller cited sub Interest.

UNDER § 225 ERRONEOUSLY PAID TAX will be refunded if the order be modified or reversed within the time specified in said section. Vide cases cited sub Vacating Decree. It is not necessary to obtain order to refund. *Matter of Cameron*, 97 App. Div. 436-438, affirmed, without opinion, 181 N. Y. 560, *supra*, page 305.

Recovery of refund under § 225 barred by lapse of time. *Matter of Hoople*, 179 N. Y. 308; *Matter of Buckingham*, 106 App. Div. 13-17; *Matter of Von Post*, 35 Misc. 367.

MANDAMUS issued compelling state comptroller to refund tax collected under order made without jurisdiction. *Matter of Coogan*, 27 Misc. 563, affirmed, without opinion, 162 N. Y. 613.

TEMPORARY PAYMENT to state comptroller or County treasurer (§ 222) "is not the concern of appraiser or the surrogate. It is deductible from the amount finally found due. If nothing be due, then it must be refunded." *Matter of Skinner*, 106 App. Div. 217-218. *Vide* Payment of Tax.

INTEREST on refund under § 241 is paid. *Vide* Interest. Refund under § 225 does not carry interest. Prior to amendment of § 225 by Laws 1907, chap. 323, in effect May 9, 1907, it was held that a refund under § 225 should be restored with interest. *Matter of O'Berry*, 179 N. Y. 285-293.

Vide fourth paragraph of § 230, *supra*, page 17.

REFUSAL

Refusal to accept legacy or devise, *vide* Election.

Refusal to furnish information at hearing, *vide* Contempt.

REGISTER

Vide last sentence of § 236, *supra*, page 25, and last sentence of § 239, *supra*, page 27.

REGISTRAR OF STOCK

Vide Transfer of Securities.

REHEARING

Surrogate may remit report to appraiser. *Matter of Kelly*, 29 Misc. 169-170; *Matter of Caroline W. Astor*, 137 App. Div. 922, opinion of Surrogate quoted *supra*, page 107. *Vide etiam* Appeal; Reappraisal; Vacating Decree.

RELATIONSHIP

RELATIONSHIP TO DECEDENT determines amount of exemption and rates of tax; *supra*, page 43.

RELATIVES OF THE HALF BLOOD discussed *supra*, page 46.

Decedent's Estate Law, *supra*, page 548.

RELEASE OF BEQUEST OR DEVISE

Vide Election.

RELIGIOUS

RELIGIOUS CORPORATION exempt under the first sentence of § 221. Vide cases cited sub Exemptions.

Chap. 600, Laws of 1910, in effect June 23, 1910, added to what now is the first sentence of § 221 the words, "for **RELIGIOUS CEREMONIES**, observances or commemorative services of or for the deceased donor." Before this amendment it was held in the *McAvoy* case, 112 App. Div. 377 (1906), that a legacy for masses to pastor of a church was not exempt. In a subsequent case, *Matter of Didion*, 54 Misc. 201 (1907) the surrogate held that a legacy "directly to religious bodies" was exempt, "the provision for masses being merely collateral and incidental."

REMAINDERS

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| (1) Remainder taxed under statute in force at death of testator. | (6) Taxation suspended in certain cases. |
| (2) Remainders created prior to statute. | (7) Tax payable from principal. |
| (3) Contingent or defeasible remainders created subsequent to statute and prior to 1899 amendment. | (8) Hardship to life tenant. |
| (4) When remainder taxable at full value. | (9) Temporary order under § 230. |
| (5) 1899 amendment. | (10) When temporary order should not be entered. |
| | (11) Deposit of securities under § 241. |
| | (12) 1910 amendment to § 243. |

(1) Remainder taxed under statute in force at death of testator

It is the statute in force at the death of the testator, and not the statute in effect at the death of the life tenant, which governs the taxation of the remainder. *Matter of Roosevelt*, 143 N. Y. 120-122, *supra*, page 188; *Matter of Davis*, 149 id. 539, *supra*, page 201; *Matter of Sloane*, 154 id. 109-113, *supra*, page 218; *Matter of Meyer*, 83 App. Div. 381; *Matter of Mason*, 120 App. Div. 738, *supra*, page 345, affirmed, without opinion in 189 N. Y. 556, sub nom. *Matter of Naylor*.

"The decedent having died in 1896 the taxation of his estate was governed by the statute in existence at that time. *Matter of Davis*, 149 N. Y. 539. The statute of 1897 authorizing the taxation of remainders at their full undiminished value was not retroactive. *Matter of Meyer*, 83 App. Div. 381. The State Superintendent of Insurance having ascertained the value of

the remainder interest which vested upon the death of Florence R. Wright to be \$3,753, an order may be submitted upon notice assessing the tax upon this amount." *Matter of Buckham*, N. Y. Law Journal, January 10, 1912.

As to remainder passing under exercise of power of appointment vide cases cited sub Power of Appointment, *supra*, page 768.

(2) Remainders created prior to statute

MATTER OF PELL, 171 N. Y. 48, *supra*, page 261, held that a remainder vested prior to the statute was not subject to the tax, and that the last sentence of the then § 230, added by the Laws of 1899, chap. 76, *supra*, page 457, was unconstitutional. Vide etiam *Matter of O'Berry*, 179 N. Y. 285, *supra*, page 289; *Matter of Haight*, 152 App. Div. 228; *Matter of Seamen*, 147 N. Y. 69, *supra*, page 196; *Matter of Gibson*, 157 N. Y. 680, *supra*, page 226; *Matter of Hitchins*, 181 N. Y. 553, *supra*, page 304.

CONTINGENT remainders created prior to the statute were held not subject to the tax in *Matter of Smith*, 150 App. Div. 805. Vide etiam *Matter of Lansing*, 182 N. Y. 238-248, *supra*, page 308; *Matter of Craig*, 97 App. Div. 289-291, *supra*, page 303, affirmed, on opinion below, 181 N. Y. 551.

As to subdivision 5 of § 220 vide *Matter of Seamen*, 147 N. Y. 69-77, *supra*, page 198; *Matter of Spaulding*, 49 App. Div. 541-549, affirmed, without opinion, 163 N. Y. 607; *Matter of Dows*, 167 N. Y. 227-233; *Matter of Craig*, 97 App. Div. 289, affirmed, on opinion below, 181 N. Y. 551; *Matter of Abraham*, 151 App. Div. 441-443.

As to POWER OF APPOINTMENT vide subdivision 6 of § 220; *Matter of Delano*, 176 N. Y. 486, *supra*, page 280.

(3) Contingent or defeasible remainders created subsequent to statute and prior to 1899 amendment

Such remainders are taxable when they vest in possession.

IN MATTER OF RICHARD S. ELY, 157 App. Div. 658, the decedent died a resident March 7, 1894. An appraiser was thereupon appointed who made his report and an order of the surrogate was entered April 29, 1895, confirming the report.

Section 3 of chapter 399 of the Laws of 1892, *supra*, page 426, which was the statute in force at the time of decedent's death, provided that the transfer of these interests, the value of which

was not ascertainable at the date of the appraisal, was not taxable until such interests vested in possession. Therefore the appraiser in the original proceeding brought to assess a tax upon the estate of the decedent could not report the value of such interests as subject to taxation.

The state comptroller applied in March 1913 for the appointment of an appraiser to appraise the value of the remainder interests which had not been taxed in the 1895 appraisal. This application was opposed by the estate on the ground that nowhere in the 1895 report of the appraiser or in the "order confirming the same, is there any statement or intimation direct or indirect that the taxation of any part of the decedent's estate which was before the appraiser for appraisal was suspended." Folio 75 of printed papers on appeal.

Surrogate Fowler in granting the application of the state comptroller held that as it was "clear from the language of the will that such values were not ascertainable at the time of the appraisal, it will not be presumed, in the absence of an express finding, that the appraiser considered that such values were ascertainable and that his failure to report them as subject to taxation is equivalent to a finding that they were exempt from taxation."

The Appellate Division affirmed the surrogate.

Vide etiam *Matter of Irwin*, 36 Misc. 277.

INTEREST should be charged not from the death of testator creating estate but "only from the time of the death of the life tenant." *Matter of Davis*, 149 N. Y. 539-549, *supra*, page 202.

PRIOR TO THE 1897 AMENDMENT it was held in *Matter of Sloane*, 154 N. Y. 109, *supra*, page 218, that where a remainder falls in upon determination of prior estate by remarriage the value of the particular estate of the widow during term of her widowhood should be deducted.

(4) When remainder taxable at full value

The seventh paragraph of § 230 provides: "Estates in expectancy which are contingent or defeasible and in which proceedings for the determination of the tax have not been taken or where the taxation thereof has been held in abeyance, shall be appraised at their FULL, UNDIMINISHED VALUE when the persons entitled thereto shall come into the beneficial enjoyment or possession thereof, without diminution for or on account of

any valuation theretofore made of the particular estates for purposes of taxation, upon which said estates in expectancy may have been limited."

The wording of this paragraph of § 230 has remained unchanged since Laws 1901, chap. 173. A similar provision first appeared in the statute by the amendment of Laws of 1897, chap. 284, it being inserted as the third sentence of the then § 230, *supra*, page 453. The provision was dropped from the statute at the time of the amendment of § 230 by the Laws of 1899, chap. 76, *supra*, page 456, but was restored by said 1901 amendment. *Matter of Hosack*, 39 Misc. 130-132; *Matter of Connolly*, 38 id. 533.

For discussion as to meaning and intendment of provision vide *Matter of Kennedy*, 93 App. Div. 27-30; etiam *Matter of Meyer*, 83 id. 381; *Matter of Mason*, 120 id. 738, *supra*, page 346, affirmed, without opinion, in 189 N. Y. 556, sub nom. *Matter of Naylor*.

IN MATTER OF AMOS R. ENO, N. Y. Law Journal, April 24, 1913, Surrogate Cohalan held: "Florence C. Eno Graves and Mary P. Eno, two of the legatees mentioned in the will of the decedent, have appealed from the order assessing a tax upon the transfer of their interests in the decedent's estate. THE DECEDENT DIED ON THE 21st DAY OF FEBRUARY, 1898. He gave to trustees the sum of \$500,000 and directed that they pay the income therefrom to his granddaughter, Florence C. Eno Graves, until she arrived at the age of 27 years, when she was to receive the principal. The will contained a similar provision for the benefit of his granddaughter, Mary P. Eno. If, however, either of them died before reaching the age of 25 the principal was to be paid to her issue, and in the event of both of them dying without issue the principal was to be paid to the issue of the testator.

"The transfer tax appraiser designated to appraise the estate of Amos R. Eno ascertained the value of the respective temporary life estates of Florence C. Eno Graves and Mary P. Eno until they arrived at the age of 25, and the order entered upon his report assessed a tax upon the value of this interest. WHEN THE TWO LIFE TENANTS ARRIVED AT THE AGE OF 25 the State Comptroller made an application to have the tax assessed upon the \$500,000 which each of them then received under the will of the decedent, and an order was entered to this effect. From that order this appeal is taken.

"SECTION 230 OF CHAPTER 284 OF THE LAWS OF 1897 provides: 'Estates in expectancy which are contingent or defeasible shall be appraised at their full undiminished value when the persons entitled thereto shall come into the beneficial enjoyment or possession thereof, without diminution for or on account of any valuation theretofore made of the particular estates for purposes of taxation.' As this was the statute in force at the time of decedent's death, the transfer of the legacies to Florence C. Eno Graves and Mary P. Eno is governed by it. The legacy in the principal sum of \$500,000, being contingent upon the legatee arriving at the age of 25, was defeasible by her death before that time, and was therefore within the provision of the statute providing for the taxation of such estates at their FULL UNDIMINISHED VALUE when they vested in possession. The value of her temporary life estate was taxed and when she received the principal sum of \$500,000 it was taxed. .

"The language of the statute is so clear and unambiguous that there can be no question as to the intent of the Legislature. Its manifest intention was that a tax should be assessed upon the transfer of the value of the life interest, and a subsequent tax imposed upon the transfer of the corpus of the trust fund. This was the procedure adopted in the taxation of the interests of the legatees who have taken this appeal. The amendment effected by chapter 76 of the Laws of 1899, which eliminated the provision above quoted, was not retroactive and did not affect or impair any rights accrued or liability incurred prior to the time when such amendment took effect (sec. 93, General Construction Law; Matter of Milner, 76 Hun, 328).

"The attorney for the legatees contends that the Act of 1897 was unconstitutional. This being a court of first instance it will assume the constitutionality of the act. If, however, authority were needed to show that the Legislature may provide for the imposition of a tax upon the transfer of a life interest and subsequently upon the transfer of the principal when it vests in possession, it would be supplied by the following cases: *Campbell v. California* (200 U. S. 87), *Beers v. Glynn* (211 U. S. 477) and *Keeney v. New York* (222 U. S. 525). Order fixing tax affirmed." VIDE ETIAM, Matter of Naylor, 189 N. Y. 556, *supra*, page 345.

(5) 1899 amendment

The earlier cases held where it was impossible to determine

what interest, if any, would go to a remainderman that the time of taxation of such remainder should be postponed until the death of the life tenant. *Matter of Curtis*, 142 N. Y. 219, *supra*, page 185, and *Matter of Roosevelt*, 143 N. Y. 120, *supra*, page 188, are leading cases. As was said by Justice Finch in *Matter of Curtis*, *supra*, there should not be a tax "upon what is in form but a theory and in fact only an illusion."

Where, however, a remainder was vested and indefeasible it was taxed at the time of the death of the creator of the remainder, the taxation not being postponed until the remainder fell into possession by reason of the termination of the previous estate. *Matter of Dows*, 167 N. Y. 227-233 *supra*, page 250, sustained in 183 U. S. 278, sub nom. *Orr v. Gilman*; *Matter of Runcie*, 36 Misc. 607.

This continued to be the law until the amendment to section 230 by chapter 76 of the Laws of 1899, *supra*, page 456, in effect March 14, 1899. *Matter of Vanderbilt*, 172 N. Y. 69, *supra*, page 268; *Matter of Brez*, id. 609, *supra*, page 271; *Matter of Tracy*, 179 N. Y. 501, *supra*, page 292; *Matter of Guggenheim*, 189 N. Y. 561, *supra*, page 347; *Matter of Burgess*, 204 N. Y. 265-269, *supra*, page 382; *Matter of Huber*, 86 App. Div. 458-461.

These cases held that the legislature intended to and did change the law so that remainders, even though contingent and defeasible, were taxable at the death of the testator creating the remainder. As was said by the court in *Matter of Vanderbilt*, *supra*, "The tax is not required to be paid by the conditional transferee, for, by the provisions of the statute, it is to be paid 'out of the property transferred.' So that whoever may ultimately take the property takes that which remains after the payment of the tax."

It was also held that the tax on the remainder "shall be imposed at the HIGHEST RATE for any possible succession that may occur in any contingency." *Matter of Brez*, 172 N. Y. 609-611, *supra*, page 271. Vide dissenting opinion in the *Brez* case written by Justice Edward T. Bartlett, and concurred in by Justices O'Brien and Vann.

Since the *Vanderbilt* and *Brez* cases, *supra*, it has been the practice to tax remainders upon the death of the testator creating the remainders, with the exception of the instances hereinafter noted. Vide *post*, page 829 as to 1910 amendment to first sentence of § 243.

(6) Taxation suspended in certain cases

IN *MATTER OF HOWE*, 86 App. Div. 286, affirmed, without opinion, 176 N. Y. 570, *supra*, page 284, it was held, where the testator created a life estate and gave a POWER OF APPOINTMENT over the remainder, that the taxation of said remainder should be postponed until the death of the life tenant. In the later case of *MATTER OF BURGESS*, 204 N. Y. 265, *supra*, page 380, the court laid down the rule that the taxation of the remainder should not be suspended unless the power of appointment was an absolute one. The reasoning in the *Howe* case, *supra*, was that the said 1899 amendment did not repeal or render nugatory that portion of section 220 now embodied in subdivision 6 of the present section 220. As to taxation of remainder where there is a gift of a power of appointment vide cases cited sub Power of Appointment *supra*, page 768.

It was also held that there was another exception to the Vanderbilt and Brez rule where the life estate created had accompanying it a POWER TO INVADE the principal. This was determined in *MATTER OF BABCOCK*, 37 Misc. 445, affirmed, without opinion, 81 App. Div. 645. The state comptroller did not appeal, and it has been the practice not to tax presently a remainder where there is a power to invade the principal. *Matter of Granfield*, 79 Misc. 374-381, *supra*, page 783.

The Babcock decision was based on the theory that the 1899 amendment did not repeal or limit that portion of the statute which now forms the second sentence of section 222.

The seventh paragraph of § 230 providing that, "estates in expectancy which are contingent or defeasible and in which proceedings for the determination of the tax have not been taken or where the taxation thereof has been held in abeyance, shall be appraised at their full, undiminished value when the persons entitled thereto shall come into the beneficial enjoyment thereof," is not intended to limit the rule that taxation of remainders, though contingent, are taxable forthwith. *Matter of Kennedy*, 93 App. Div. 27. Vide etiam *supra*, page 830.

(7) Tax payable from principal

Prior to amendment by chap. 76, Laws of 1899, in effect March 14, 1899, "some of the courts had decided that the transfer tax on life estates was payable out of income and no tax could be imposed on contingent remainders," but after the 1899 amendment, vide sixth paragraph of the present § 230,

transfer taxes imposed upon estates for life and in remainder are payable out of the corpus and not out of the income. *Matter of Tracy*, 179 N. Y. 501-508-510, *supra*, page 292; *Matter of Hoyt*, 44 Misc. 76; *Matter of Bushnell*, 73 App. Div. 325-328, *supra*, page 275, affirmed, without opinion, 172 N. Y. 649.

In an estate where testator died in 1890 the surrogate held that the life tenant "was not liable to pay the tax upon the remainders, but that the same should be borne by the beneficiaries." *Matter of McMahon*, 28 Misc. 697.

(8) Hardship to life tenant

IN *MATTER OF BREZ*, 172 N. Y. 609 (1902), *supra*, page 271, was pointed out and deplored "the hardship to the life beneficiary which is involved if the remaindermen are taxable at 5 per cent, while the life interest is only taxable at 1 per cent." *Matter of Hoyt*, 44 Misc. 76-78.

This "inequality caused by the statute" was in part remedied by the amendment to §§ 230 and 241 by the Laws of 1911, chap. 800, in effect July 28, 1911.

(9) Temporary order under § 230

Said chapter 800, Laws of 1911, *supra*, page 531, amended the sixth paragraph of § 230 by inserting the new provision that "the surrogate shall enter a TEMPORARY ORDER" as therein provided.

IN *MATTER OF HENRY W. EVERETT*, New York County, the state comptroller in an opinion, dated June 5, 1913, 3 State Department Reports, 450, said: "The department is of the opinion that the order of April 4, 1913, is not in proper form to enable the comptroller to comply with the provisions of the amendment to section 241 of the Tax Law. * * * To comply with this provision the taxing order should first extend the tax on the remainders as they would be taxable if they had actually vested in possession on the day of the appraisal, and this statement should be followed by the extension of the tax at the highest rate on which there is any possibility of the remainders ultimately vesting; and the difference between the tax at the highest rate and the other tax as shown to be due in the event of the remainders having vested at the date of the appraisal would be the amount the comptroller should retain and pay the income thereon to the executors of the estate until the remainders ultimately vested.

"The order as entered, however, will apparently protect the rights of all interested persons, as it contains the following provision:

"Said report and this order are made on the distinct understanding and agreement by and between the parties hereto that in the event of the death of any of the parties in interest, so that under the provisions of the will this estate will vest differently than as provided for herein, said report will be remitted for reappraisal in accordance therewith."

"This provision does not, however, permit me to hold any part of the tax as assessed and pay the income therefrom to the executors."

Vide etiam MATTER OF BILLINGSLEY, 1 State Department Reports, 569, opinion quoted sub Interest, *supra*, page 725.

(10) When temporary order should not be entered

The state comptroller in an opinion, dated May 19, 1913, 2 State Department Reports, 503, states: "In the appraisal of estates where the widow is given a life estate in certain property, with power to use a part or all of the corpus of the fund for her support and maintenance, with remainder to the decedent's son, your practice in appraising the value of the interest of the widow as though it was a life estate only and holding the taxation of the remainder in abeyance until the death of the life tenant, is correct, and I do not believe the amendment to section 230 of the Tax Law, by chapter 800 of the Laws of 1911, providing for the entry of a 'temporary' order affects the practice in this respect.

"Chapter 800 of the Laws of 1911 (in effect July twenty-eighth of that year), amended sections 230 and 241 of the Tax Law. The 6th paragraph of section 230 was amended in reference to taxing contingent remainders, by providing that,

"When property is transferred in trust or otherwise, and the rights, interest or estates of the transferees are dependent upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended or abridged, a tax shall be imposed upon said transfer at the highest rate which, on the happening of any of the said contingencies or conditions, would be possible under the provisions of this article, and such tax so imposed shall be due and payable forthwith by the executors or trustees out of the property transferred, and the surrogate shall enter a temporary order determining the amount of said tax

*in accordance with this provision; * * * and the executor or trustee of each estate, or the legal representative having charge of the trust fund, shall immediately upon the happening of said contingencies or conditions apply to the surrogate of the proper county, upon a verified petition setting forth all the facts, and giving at least ten days' notice by mail to all interested persons or corporations, for an order modifying the temporary taxing order of said surrogate so as to provide for the final assessment and determination of the tax in accordance with the ultimate transfer or devolution of said property.'*

"A part of the amendment to section 241 by chapter 800 of the Laws of 1911, refers particularly to the payment of tax on contingent remainders, as follows:

"'Whenever the tax on a contingent remainder has been determined at the highest rate which on the happening of any of said contingencies or conditions would be possible under the provisions of this article, the state comptroller, in the counties wherein this tax is payable direct to him, and in all other counties the treasurer of said counties, respectively, when such tax is paid shall retain and hold to the credit of said estate so much of the tax assessed upon such contingent remainders as represents the difference between the tax at the highest rate and the tax upon such remainders which would be due if the contingencies or conditions had happened at the date of the appraisal of said estate, and the state comptroller or the county treasurer shall deposit the amount of tax so retained in some solvent trust company or trust companies or savings banks in this state, to the credit of such estate, paying the interest thereon when collected by him to the executor or trustee of said estate, to be applied by said executor or trustee as provided by the decedent's will.'

"These amendments suggest the practice that a temporary order must first determine the tax as it would be if the remainders had vested in possession and enjoyment on the date of the appraisal, and by the same order determine the tax on the property as it might ultimately vest upon the happening of the contingencies expressed in the will, whereby the remainder would vest in persons taxable at the highest rate.

"It is therefore apparent that the entry of a *temporary* order was only to apply to cases where the remainders were contingent, as such orders must necessarily be of a temporary nature until the ultimate vesting of the property.

"In the case you have under consideration the son takes a vested remainder, subject to the widow's life estate and also subject to be divested to the extent the widow may avail herself of the right to invade the property. And the right to invade the property does not make the son's estate contingent as to its vesting, but only contingent as to the *amount* he may ultimately receive."

Vide Matter of Babcock, 37 Misc. 445, affirmed, without opinion, 81 App. Div. 645, and Matter of Granfield, 79 Misc. 374, opinion quoted, sub Power to Invade Principal, *supra*, page 783.

(11) Deposit of securities under § 241

The last two paragraphs of § 241, added by chap. 800 of the Laws of 1911, provide, *inter alia*, for the deposit of securities by the executors or trustees of an estate (*supra*, page 532). A ruling, dated February 10, 1913, of the state comptroller, 1 State Department Reports, 566, states: "If the decedent to whose estate you refer died subsequent to July 28, 1911, the date when the amendment to section 241, by chapter 800 of the Laws of 1911, went into effect, and the tax on contingent remainders has been assessed as the highest rate which on the happening of any of said contingencies or conditions will be possible, the representatives of the estate may pay a sum in cash equal to the amount of tax which would be due if the remainders had actually vested in possession and enjoyment at the date of the appraisal of the estate, and may deposit with the comptroller bonds or other securities approved by him to the amount of the balance of tax as determined contingently by the temporary taxing order, the income therefrom to be paid by the comptroller to the executors or trustees of the estate, until the termination of the widow's life estate.

"This amendment requires the comptroller to pay into the state treasury the tax which would be due if the remainder had vested at the time of the appraisal of the estate. Therefore, a sum representing this part of the tax must be paid *in cash or by check*; but the residue of the tax as assessed can be paid by depositing either bonds or cash, at the option of the executors or trustees.

"As to your second inquiry, the department is of the opinion that in the event of a deposit of bonds having been made as aforesaid, if an appeal should be taken, resulting in the deter-

mination that the taxation of the remainders contingently was improper or that the temporary taxing order for any other reason was irregular, the comptroller would be justified, as soon as a modifying order had been entered, in immediately returning the excess of the deposit of either bonds or cash, retaining only the amount necessary to enable the executors or trustees to comply with the provisions of the taxing order as modified; or if the modified order found no tax presently due, the whole amount so deposited would be returned forthwith."

IN MATTER OF LEUFF, 1 State Department Reports, 567, the comptroller handed down an opinion, dated February 11, 1913, as follows:

"(1) New York city registered bonds will be accepted by the comptroller to an amount representing a sum sufficient to pay the difference between the transfer tax assessed at the highest rate which, on the happening of any of the contingencies or conditions, will be possible, and the tax which would be due if the remainders had actually vested in possession and enjoyment at the date of the appraisal of the estate.

"(2) AS THE REPRESENTATIVES OF BUT FEW ESTATES HAVE AVAILED THEMSELVES OF THE PROVISIONS OF THIS AMENDMENT, THE DEPARTMENT HAS NOT ISSUED ANY RULES OR REGULATIONS as to the deposit of bonds or securities, nor has it been deemed necessary to require a margin over the par or market value of the securities, for the reason that the amendment by section 241 requires the executors or trustees to make up any deficiency in tax if it appears that they have deposited securities of less value than the tax ultimately found due.

"(3) If after the entry of the temporary taxing order and the deposit of cash or securities in pursuance thereof, litigation should arise, resulting in modifying the temporary taxing order so as to reduce the tax, the department would be justified in immediately returning to the representatives of the estate so much of the cash or securities, or both, as represents the excess payment as shown by the amending order, retaining only the amount necessary to enable the executors or trustees to comply with the provisions of the taxing order as modified.

"IF NO TEMPORARY TAXING ORDER HAS BEEN ENTERED by the surrogate the department would not feel justified in accepting bonds or other securities in the same manner as cash or checks are now accepted in anticipation of tax, in order to allow

discount or to prevent penalty from attaching for nonpayment within eighteen months from the accrual of the tax."

(12) 1910 amendment to § 243

IN MATTER OF J. EDWARD SIMMONS, N. Y. Law Journal, June 14, 1912, Surrogate Fowler held: "As section 230 of the Tax Law was not changed by the amendment of 1910, it must be presumed that the Legislature intended that the provisions of that section should apply to the assessment of tax under the new rates. Where, therefore, a remainder is contingent, but is limited to beneficiaries of the one per cent. primary rates, it must be taxed as if it passed to a single individual of that class; if it may pass to beneficiaries in the classification of the five per cent. primary rate, it must be assessed as if it passed to a single individual in that class.

"The remainder after the life estate of decedent's widow should be taxed as follows: Mabel S. Tilden, daughter, surviving life estate in the sum of \$250,000; remainder after said life estate to be assessed against the trustees and taxed at the five per cent. rate. All the rest and residue of the remainder should be assessed against the trustees for Joseph F. Simmons, son, at the rate of one per cent. The order submitted upon the appraiser's report may contain a provision that, upon the vesting in possession of any of the remainders, or the exercise of any of the powers of appointment given by decedent's will, an application may be made to modify the order fixing tax in accordance with the actual devolution of the property." Vide etiam Matter of Hogg, 156 App. Div. 301 (Second Department), reversing 78 Misc. 703.

The surrogate calls attention to § 230, but the same observation may be made regarding § 222. The legislature, however, did amend the first sentence of section 243 to read: "The words 'estate' and 'property,' as used in this article, shall be taken to mean the property or interest therein passing or transferred to individual or corporate legatees, devisees, heirs, next of kin, grantees, donees or vendees, and *not* as the property or interest therein of the decedent, grantor, donor or vendor and shall include all property or interest therein, whether situated within or without this state." This 1910 amendment changed the principle of the law as it had existed since 1892. Matter of Hoffman, 143 N. Y. 327; Matter of Corbett, 171 N. Y. 516, *supra*, page 264; Matter of Costello, 189 N. Y. 288, *supra*, page 344.

The question naturally arises whether with the introduction of the new principle of individual exemptions and graded rates and the change of section 243 *by the same amendment*, chapter 706, Laws of 1910, *supra*, page 524, the legislature in its wisdom did not intend that, in the words of the second sentence of section 222, "taxes upon the transfer of any estate, property or interest therein limited, conditioned, dependent or determinable upon the happening of any contingency or future event by reason of which the fair market value thereof can not be ascertained at the time of the transfer as herein provided, shall accrue and become due and payable when the persons or corporations beneficially entitled thereto shall come into actual possession or enjoyment thereof."

As the question is of such practical importance it is to be hoped there will be a judicial explanation of "the intention of the legislature" as now expressed in § 221a, the second sentence of § 222, the sixth paragraph of § 230, the seventh paragraph of § 230, the last two paragraphs of § 241, and the first sentence of § 243.

REMISSION OF PENALTY

Vide Interest.

REMITTING REPORT

Report of appraiser may be remitted by surrogate. *Matter of Kelly*, 29 Misc. 169-170; *Matter of Caroline W. Astor*, 137 App. Div. 922, opinion of surrogate quoted *supra*, page 107.

RENT

"Rent reserved to the deceased which had accrued at the time of his death" is an asset of the estate. Subdivision 7 of § 2712 of Code of Civil Procedure; *Jay v. Kirkpatrick*, 26 Misc. 550. As to apportionment of rents vide § 2720.

RENUNCIATION

Vide Election.

REORGANIZATION CERTIFICATES

In **RESIDENT** estate are subject to tax.

In **NON-RESIDENT** are not subject to tax. Prior to 1911 amendment if they related to New York corporation they were subject to tax. If to a foreign corporation they were not, even

though the reorganization certificates were issued by a New York trust company. Matter of Rhoads, 190 N. Y. 525.

REPEAL

While chap. 399, Laws of 1892, repealed the original act of 1885 without any saving clause in the repealing act itself, still the Transfer Tax Law has been continuously in force because of the Statutory Construction Law, chap. 677, Laws 1892, § 32. Matter of Jones, 54 Misc. 202-205. Vide etiam § 93 of General Construction Law.

As to effect of repeal of a portion of statute vide cases cited sub Legislative Declaration.

REPORT

The report of appraiser is made in duplicate, vide last sentence of § 230, *supra*, page 19.

Report of appraiser in resident estate, page 50. In non-resident estate, page 155.

Vide cases cited sub Appraiser, page 599, and Interlocutory Order, page 727.

RES ADJUDICATA

Decree of surrogate in transfer tax proceedings binding on questions of taxation only. Matter of Ullmann, 137 N. Y. 403-407; Amherst College *v.* Ritch, 151 id. 282-343.

Unless appeal taken the Surrogate's decree is final. Matter of Wolfe, 137 N. Y. 205-214; Matter of Davis, 149 N. Y. 539-548. See, however, cases cited sub Appeal, and also sub Vacating Decree.

Only on material, relevant and necessary facts decided is order binding. Matter of Mason, 120 App. Div. 738-740, affirmed, without opinion, sub nom. Matter of Naylor, 189 N. Y. 556.

As to claim of *res adjudicata* in an estate where taxation of trust interest has been suspended, vide Matter of Irwin, 36 Misc. 277, and Matter of Ely, 157 App. Div. 658, *supra*, page 818.

Power of appointment was exercised by donee over a portion of the property covered by power of appointment. Held, that the property transferred by the power of appointment was taxable in donee's estate although it had, by error, been taxed in donor's estate at the time of donor's death in 1893. Matter of

Stuart, N. Y. Law Journal, May 10, 1913, opinion quoted *supra*, page 772.

In an estate where the decedent died prior to chap. 76, Laws 1899, the appraiser reported that the value of the interests of the life beneficiaries could not then be ascertained, and that the remaindermen were indefinite and uncertain and that the tax could not then be determined. The appraiser's report was confirmed by order of the surrogate. After the time to appeal had expired another appraiser was appointed, and he proceeded to fix the tax upon the *income* which had been paid to life beneficiaries. Held, that as the situation was precisely the same as it was when the original order was made, except as to the income paid, that the original order was absolutely binding upon Comptroller, and that the second report was improper. Matter of Lawrence, 96 App. Div. 29.

Code of Civil Procedure, § 2476, subdivision 1, gives exclusive jurisdiction to surrogate of county in which resident decedent resides, and under § 228 of Tax Law decree of such surrogate is *res adjudicata* against comptroller in proceedings brought in another county. Matter of Seaver, 63 App. Div. 283.

COMPTROLLER SHOULD BE MADE PARTY to agreement regarding assets of estate if he is to be bound thereby, vide Compromise of Claim.

As to effect of judgment in action to construe will in which comptroller was not a party vide Matter of Willets, 119 App. Div. 119-126, affirmed, without opinion, 190 N. Y. 527; Matter of Edson, 38 App. Div. 19-21, affirmed, on opinion below, 159 N. Y. 568.

As to action for specific performance of an ante-nuptial contract vide Matter of Kidd, 115 App. Div. 205-210, reversed on other points, 188 N. Y. 274.

RESERVATION

As to reservation of **INCOME** vide Matter of Keeney, 194 N. Y. 281-286, *supra*, page 362, and cases cited sub Gift and sub Trust Deed.

RESETTLEMENT OF ORDER

Vide Matter of Francis, N. Y. Law Journal, November 26, 1913, *post*, page 886.

"The surrogate's order denying the motion to resettle his

first order is not appealable." Matter of Sondheim, 69 App. Div. 5.

RESIDENCE

Under the second paragraph of § 230 the appraiser "is authorized to issue subpoenas and to compel the attendance of witnesses before him," and practice has been, in cases of disputed residence, for the appraiser to take testimony and to report his findings to the surrogate. In view of the amendment by chap. 732, Laws 1911, in effect July 21, 1911 (vide page 134) the question of residence of decedent is being examined into with even closer scrutiny than formerly.

In Matter of FREDERICK DENT GRANT, N. Y. Law Journal, November 14, 1913, Surrogate Fowler held: "This appeal is taken by the state comptroller from the order entered upon the appraiser's report exempting the estate from taxation. In one of the affidavits submitted to the appraiser by the executor of the estate it was alleged that the decedent was a resident of New York. In another it was alleged that the decedent was an officer in the United States Army and that his domicile was in Washington. His will was probated here as a resident of New York. The appraiser found that the decedent was a non-resident of this State.

"THE APPRAISER HAD NO POWER TO DETERMINE THE DOMICILE OF THE DECEDENT. When it appeared from the papers submitted to him that there were conflicting allegations as to the domicile of the decedent the appraiser should have reported this fact to the surrogate and suspended appraisal of the estate until the surrogate had determined the question of domicile. Matter of Bishop, 82 App. Div. 112. While the appraiser had no jurisdiction to pass upon the disputed question of decedent's domicile, the affidavits upon this point were submitted to him without objection; and for the purpose of facilitating the disposition of this appeal and saving the executrix the inconvenience of further examination I will determine the question of domicile from the evidence submitted to the appraiser, provided the attorneys for the parties to the proceeding file a consent to this effect. If such consent is not filed before the 17th inst. I will place the matter upon my issue of fact calendar for the purpose of taking testimony upon the question of decedent's domicile."

Subsequently on December 8, 1913, the surrogate handed down an opinion in which was exhaustively reviewed the prin-

ciple of domicile and residence. The decedent was held to be a non-resident, the facts of the case being "enough to make out his actual residence in Federal territory."

Whether the GRANT decision, will be interpreted to mean that in the future all questions of disputed residence will be submitted in the first instance to the surrogate for his decision is not clear.

It would seem that the reasoning of the surrogate in *MATTER OF BARNES*, N. Y. Law Journal, December 17, 1913, *supra*, page 597, might be applied with equal force to questions of residence. As was said by Surrogate Fowler in the Barnes case, *supra*: "Unless the appraiser may in the first instance take testimony on disputed questions of ownership *and pass upon questions of law arising in the proceeding and necessarily incident to the determination of the taxability of the estate*, the appraiser's title would seem to be a misnomer and his duties in connection with the appraisal of the estate would be merely clerical and perfunctory and those of an assessor."

STATEMENT IN WILL. In *Matter of Frederic Schumacher*, N. Y. Law Journal, July 22, 1913, an application was made to declare an estate exempt. Surrogate Cohalan in denying the application said: "The decedent herein died April 3, 1912. In his will, executed January 1, 1912, he describes himself as 'Frederic Schumacher, of the City of New York.' This clear statement of the decedent's domicile, made by him a few days in excess of three months before his death, seems to fix his domicile in the State of New York. This statement is not explained by any allegation in the moving papers. As, however, it may be possible for the executors to produce proof controverting or explaining this statement, an order should be entered appointing an appraiser to take proof on the question of decedent's domicile with the further proviso that if said appraiser concludes that the decedent was a resident of the State of New York, that he appraise the property of said decedent accordingly."

Testator was born in New Jersey, living there many years. He died in New Jersey. About fifteen years before his death in 1904 he broke up housekeeping in New Jersey, spent his winters in New York and his summers in New Jersey. He lived in either boarding house or hotel in New York, and in 1900 and 1901 voted in New York, and paid personal taxes in New York several years prior to his death as a resident of New York, and

had described himself in some instruments he had executed as a resident of New York. The spring of the year he died he returned to Newton, N. J., the place where he was born, stating that he did not intend to return to New York, but did intend to remain permanently in Newton. The surrogate decided that decedent was a resident, and the Appellate Division reversed surrogate and dismissed the transfer tax proceeding. *Matter of Nathaniel W. White*, 116 App. Div. 183.

Representative of an estate claiming that decedent was a non-resident cannot be compelled to furnish information regarding that portion of the estate which would not be subject to tax were decedent a non-resident. The question of residence should first be determined. *Matter of Bishop*, 82 App. Div. 112.

Surrogate may refer question of residence to referee under § 2546 of Code of Civil Procedure. *Matter of Bishop*, 111 App. Div. 545, appeal dismissed, 188 N. Y. 635.

FULL FAITH AND CREDIT due to proceedings of court of another state do not require New York courts shall be bound by its adjudication on the question of residence. *Matter of Tilt*, 182 N. Y. 557, reversed in 207 U. S. 43, sub nom. *Tilt v. Kelsey*, *supra*, page 311; *Matter of Cummings*, 142 App. Div. 377-387.

BENEFICIARIES' RESIDENCE immaterial. *Matter of Green*, 153 N. Y. 223; *Matter of Dingman*, 66 App. Div. 228.

RESIDUARY ESTATE

Vide Legacy.

TAX to be paid from residuary estate if will so directs. *Isham v. N. Y. Assn. for the Poor*, 177 N. Y. 218; *Matter of Smith*, 80 Misc. 140-143; *Matter of Samuel Myers*, N. Y. Law Journal, November 22, 1913, opinion quoted, *supra*, page 759.

A direction to pay legacies "without any rebate or reduction whatever" held not to mean that the tax was to be paid out of residuary estate. *Jackson v. Tailer*, 41 Misc. 36, affirmed, without opinion, 184 N. Y. 603.

Interest of a decedent in the residuary estate of another decedent is subject to tax, but the tax cannot be "imposed on the legacy of a residuary estate until the amount of that estate is ascertained." *Matter of Clinch*, 180 N. Y. 300-303; vide etiam second sentence of § 222; and *Matter of Gans*, N. Y. Law Journal, April 13, 1912, opinion quoted *post*, page 862.

ANNUITIES directed to be purchased outright for designated beneficiaries are to be deducted from residuary estate at their actual cost value, and not at the value calculated by Superintendent of Insurance under § 230. *Matter of Hutchinson*, 105 App. Div. 487. Vide cases cited sub Annuities.

EFFECT OF DEATH OF RESIDUARY LEGATEES discussed in *Matter of Hoffman*, 201 N. Y. 247.

RESULTING TRUST

Where life tenant took the property in which she had life interest and invested it in her own name, there is a resulting trust for the benefit of the remaindermen, and the property is not taxable in life tenant's estate. *Matter of Elizabeth W. Wheeler*, 115 App. Div. 616.

RETROACTIVE

Laws 1911, chap. 732, which changed the rates of tax is not retroactive. *Matter of Abraham*, 151 App. Div. 441-442; *Matter of Niles*, N. Y. Law Journal, January 5, 1912; *Matter of Bolton*, 157 App. Div. 935, appeal pending.

Amendment to statute not retroactive unless act so declares. *Matter of Miller*, 110 N. Y. 216-223; *Matter of Howe*, 112 id. 100; *Matter of Enston*, 113 id. 174-183; *Matter of Van Kleeck*, 121 id. 701-703; *Matter of Prime*, 136 id. 347; *Matter of Fayerweather*, 143 id. 114; *Matter of Seaman*, 147 N. Y. 69; *Matter of Davis*, 149 id. 539-545; *Matter of Sloane*, 154 id. 109-113; *Matter of Pettit*, 65 App. Div. 30, affirmed, on opinion below, 171 N. Y. 654.

Amendment by Laws 1897, chap. 284, now subdivision 6, § 220, retroactive in so far as it taxes the exercise of a power of appointment derived from a disposition of property made prior to the amendment. Held to be constitutional in *Matter of Vanderbilt*, 163 N. Y. 597, *supra*, page 240.

Legislature may release from the provisions of the statute property transferred prior to the passage of the releasing act. *Church of the Transfiguration v. Niles*, 86 Hun, 221-223.

In so far as chap. 76, Laws 1899, attempted to tax remainders and reversions which had vested prior to June 30, 1885, it is unconstitutional. *Matter of Pell*, 171 N. Y. 48. For recent discussion of cases, vide *Matter of Smith*, 150 App. Div. 805.

Section 244 added by chap. 382, Laws 1900, is not retroactive. *Matter of Graves*, 171 N. Y. 40.

Section 245 is retroactive and constitutional. The provisions of this section were first added to the Tax Law by Laws 1899, chap. 737, in effect May 26, 1899, as § 282. By Laws of 1909, chap. 62, it was transferred to the transfer tax portion of the Tax Law as § 245. *Matter of Strang*, 117 App. Div. 796-799; *Matter of Moench*, 39 Misc. 480.

Vide cases cited sub Doubt and sub Legislative Declaration.

REVALUATION

Vide Appeal; Reappraisal; Vacating Decree.

REVERSAL

If order of reversal is silent as to grounds on which it is made it will be assumed that the reversal was solely on law. *Matter of Brandreth*, 169 N. Y. 437-440; *Matter of Davis*, 184 id. 299; § 1338 of Code of Civil Procedure.

REVOCATION, POWER OF

Vide Gift; Trust Deed.

SAFE DEPOSIT BOX

As to property not belonging to decedent contained in decedent's safe deposit box vide *supra*, page 68.

Order permitting search of safe deposit for will, page 59.

Practice on taking of inventory of contents of safe deposit box, page 64.

Partnership safe deposit box, page 753.

Petition to surrogate for order permitting opening of safe deposit box, page 57.

Waiver from comptroller re search of safe deposit box for will, page 60.

Waiver re release of safe deposit box, page 67.

The recent decision of the Appellate Division, First Department (November 7, 1913), in the case of *PEOPLE v. MERCANTILE SAFE DEPOSIT COMPANY* is of such importance that it seems advisable to quote the opinion in full. The practice as has existed for many years and still prevails is set forth *supra*, pages 64 *et seq.* The opinion reads:

"The action was brought to recover a penalty under Section 227 of the Tax Law as it stood on July 22, 1906, (Laws 1905, Chapter 368).

"The defendant, The Mercantile Safe Deposit Company, was organized under Chapter 613, Laws 1875 (since incorporated into Sec-

tion 300 of the Banking Law), authorizing it to act as bailee for the storage and safekeeping of jewelry, plate and other valuables, and to guarantee their safety; also to let vaults, safes and other receptacles for the use of its customers, and the safe-keeping of their possession. Under this charter, the defendant has conducted what are practically two distinct classes of business: a storage business and a safe and box renting business. In the course of the former, the defendant receives articles to be stored, issues a receipt therefor, and takes manual possession thereof, the articles being placed in vaults to which representatives of the Company alone have access. On the surrender of the receipt, the articles covered thereby are delivered to the owner. In the business of renting, the defendant rents to its customer, vaults, safes and boxes, all of which are contained in a larger vault or room to which access is had through a gate guarded by one of the defendant's employees. The customer receives the key or fixes the combination of the lock to his particular vault, safe or box, and during the period of the letting, has sole control of the only means of access thereto, and uses the same as a place of safe-keeping for whatever valuables he chooses to place therein, such valuables never coming into the manual custody of the Company, and the company having no control over the same whatsoever, except such as is involved in guarding the premises and the means of access to the general vault.

"Through the agency of one Osborne, in April, 1897, the defendant rented a safe, which was recorded on defendant's books in the name of 'RUSSELL SAGE OR CHARLES W. OSBORNE,' who were severally to have access to the same, Osborne's right of access to be uninterrupted in the event of Sage's death. Sage never visited the safe, but Osborne used it constantly putting in and taking out securities. On July 22, 1906, Sage died, a fact which was almost immediately brought to the knowledge of defendant's officers. Thereafter Osborne's use of the safe continued as theretofore and defendant did nothing to interfere with his removing any of the valuables contained therein, and gave no notice of any kind to the State Comptroller. Although defendant had no knowledge whatsoever, at any time, of the contents of the safe, in fact, at the time of Sage's death, there was contained therein, securities belonging to Sage individually, securities belonging to Osborne individually, and securities belonging to persons who had pledged the same to Sage as collateral for loans made by him, but under circumstances which gave Osborne, in the event of Sage's death, the right to receive payment of the debt and surrender the collateral. These various securities were contained in one or more tin boxes.

"After Sage's death, Osborne, who became one of his executors, continued to look after his loans and from time to time, as required, took away securities which had been pledged to Sage, but none of the securities belonging to Sage personally were removed, save as some of them may have been contained in a tin box in which some of Osborne's

securities or some of the pledged securities were kept, which tin box was taken by Osborne to his office for use in the business of the day, and was returned at the end of the day with Sage's individual securities intact.

"At a date suiting his earliest convenience, a representative of the State Comptroller visited the safe in company with a representative of the Sage Estate, and inspected all of the contents belonging to Sage. Proceedings to fix the transfer tax on the Sage Estate were duly begun and concluded, and the tax was duly paid in full.

"Section 227 of the Tax Law contains the following:

"No safe deposit company * * * having in possession or under control, securities, deposits, or other assets belonging to or standing in the name of a decedent * * * including the shares of the capital stock of, or other interests in the safe deposit company * * * making the delivery or transfer herein provided, shall deliver or transfer the same to the executors, administrators or legal representatives of said decedent, or to the survivor or survivors, when held in the joint names of a decedent and one or more persons, or upon their order or request, unless notice of the time and place of such intended delivery shall personally be served upon the state comptroller at least ten days prior to said delivery or transfer; nor shall any such safe deposit company * * * deliver or transfer any securities, deposits or other assets belonging to or standing in the name of a decedent * * * without retaining a sufficient portion or amount thereof to pay any tax and interest which may be assessed on account of the delivery or transfer of such securities, deposits or other assets. * * * And it shall be lawful for the said state comptroller, personally or by representative, to examine said securities, deposits or assets at the time of such delivery or transfer.' For a failure to serve notice or to allow the examination provided for, and for a failure to retain sufficient of the securities or assets to pay the tax, the offender is made liable for the full amount of the tax with interest, 'and in addition thereto, a penalty of not less than five or more than twenty-five thousand dollars.'

"There are several grounds upon which we might affirm the judgment appealed from, but WE PREFER TO PUT OUR DECISION ON THE BROAD GROUND THAT THE STATUTE DOES NOT COVER ANY SUCH SITUATION AS THE EVIDENCE DISCLOSES IN THIS CASE. It is not necessary for us to resort to the rule of strict construction, applicable to statutes under which penalties are sought to be enforced, for in no legal sense can the defendant be said to have had 'possession' or 'control' of any of Sage's securities. In a limited sense, it had the custody of such securities because of the relation which it occupied to the safe in which they were contained. Having neither 'possession' nor 'control' of the securities, the statute imposed no duty whatsoever upon the defendant, nor could it have obeyed the statute without invading the legal rights of its

customer. The relation between the defendant and its customer, whether in this case he be regarded as Osborne and Sage jointly or severally, may have some elements comparable to those in a case of bailment, but, the legal status of the parties seem to me, to bear a closer analogy to that arising from the relation which exists between tenants of a general office building and the landlord thereof, who keeps within his control and under his care and protection, the common means of access to the building and to the suites of offices therein, but as to which, subject to any regulations that may have been established by the landlord, the rights of the tenants are exclusive.

"So far as I can see, the defendant in this case had no more 'possession' of or 'control' over the securities contained in the box in question, than such landlord has over securities contained in a safe belonging to one of his tenants and contained in the private office of the latter.

"The situation of the defendant with respect to securities contained in safes or other receptacles of deposit rented to its customers, was manifestly different from the relation which it occupied toward those who made physical deposit of valuables with defendant for which a receipt was issued. In every such case the defendant was clearly a bailee, having physical custody of the articles with power to control the delivery thereof.

"The judgment and order should be affirmed with costs."

SCHEDULES

Schedules of Assets, page 96.

Schedule A¹ page 97.

A² " 102.

A³ " 105.

A⁴ " 112.

A⁵ " 117.

A⁶ " 121.

Schedules of Deductions, page 124.

B¹ page 124.

B² " 125.

B³ " 129.

B⁴ " 132.

Schedule C—power of appointment, page 122.

Schedule D—beneficiaries and their interests, page 94.

Schedule E—property held jointly or in trust, page 123.

SCIENTIFIC CORPORATION OR ASSOCIATION

Entitled to exemptions of second sentence of § 221, *supra*, page 41.

SEAT IN STOCK EXCHANGE

Taxable in estate of resident. Matter of Hellman, 174 N. Y. 254; Matter of Curtis, 31 Misc. 83.

Not taxable in non-resident estate since amendment of subdivision 2 of § 220 by Laws 1911, chap. 732, in effect July 21, 1911, but prior to amendment it was taxable. Matter of Glendinning, 68 App. Div. 125, affirmed, without opinion, 171 N. Y. 684.

SECOND APPRAISAL

Vide Vacating Decree; Reappraisal. Report of appraiser may be remitted by surrogate. Matter of Kelly, 29 Misc. 169–170; Matter of Caroline W. Astor, 137 App. Div. 922, opinion of surrogate quoted *supra*, page 107.

SECRET RECIPES

In Matter of Brandreth, 28 Misc. 468–473, *supra*, page 255, affirmed, 169 N. Y. 437, the valuation of the stock of the Porous Plaster Company was under consideration. It was held that the appraiser “properly considered these secret recipes of value in ascertaining the value of the corporate shares.”

SETTLEMENT

Vide Composition of Tax; Compromise of Claim.

SILVERWARE

Should be itemized and set forth in Schedule A³, and appraisal by expert furnished, vide *supra*, page 108.

SISTER

Entitled to five thousand dollars exemption and the minimum rates of subdivision 1 of § 221a; *supra*, page 45.

SITUS

Vide *Mobilia Sequunter Personam*.

SPECIAL GUARDIAN

Section 231 provides that the surrogate *may* at any stage of the proceedings appoint a special guardian. It was formerly the practice to appoint special guardians but this practice is now discouraged by the courts. Matter of Kemp, 7 App. Div.

609, affirmed on opinion below, 151 N. Y. 619; Matter of Post, 5 App. Div. 113.

Surrogate Sexton of Oneida County in Matter of Jones, 54 Misc. 202, where the transfers of two infants were taxed, said at page 206: "The remaining point to be considered is whether a special guardian should have been appointed by the surrogate for the infant legatees, pending the appraisal, in order to acquire jurisdiction to tax their legacies. I hold upon the facts and record in this particular case that such an omission was not destructive of jurisdiction."

SPECIAL POWER IN TRUST

Vide Matter of Cooksey, 182 N. Y. 92-97.

SPECIAL PROCEEDING

A transfer tax proceeding is a special proceeding. Amherst College *v.* Ritch, 151 N. Y. 282-342; Morgan *v.* Warner, 45 App. Div. 424-426, affirmed, on opinion below, 162 N. Y. 612; Code of Civil Procedure, § 3334.

SPECIAL TAX

"It is not a general but a special tax reaching only to special cases and affecting only a special class of persons." Matter of Mergentime, 129 App. Div. 367-374, affirmed, on opinion below, 195 N. Y. 572.

SPECIFIC BEQUEST OR DEVISE

Subdivision 3 of § 220. Vide *supra*, page 155.

As to contract liability for improvements to be made upon property specifically devised vide Matter of Amsinck, N. Y. Law Journal, February 21, 1913, opinion quoted *supra*, page 657.

STAMPS

Vide Stock Transfer Tax.

STATE COMPTROLLER

Vide Comptroller.

STATUARY

Vide § 221*b supra*, page 43 as to when exempt.

Statuary should be set forth in Schedule A³, with title and name of sculptor, and appraisal by expert should be furnished, vide *supra*, page 108.

STATUTE OF LIMITATIONS

"The provisions of the Code of Civil Procedure relative to the limitation of time of enforcing a civil remedy shall not apply to any proceeding or action taken to levy, appraise, assess, determine or enforce the collection of any tax or penalty prescribed by this article, and this section shall be construed as having been in effect as of date of the original enactment of the inheritance tax law, provided, however, that as to real estate in the hands of bona fide purchasers, the transfer tax shall be presumed to be paid and cease to be a lien as against such purchasers after the expiration of six years from the date of accrual." Section 245, Matter of Strang, 117 App. Div. 796; Matter of Moench, 39 Misc. 480; Matter of McGee, N. Y. Law Journal, February 7, 1913, opinion quoted sub Payment of Tax.

As to BONA FIDE PURCHASES OF REAL ESTATE vide cases cited sub Lien of Tax.

Decedent died 1888 and transfer tax proceedings not instituted until 1898. Motion to vacate order assessing tax denied. Matter of Jones, 54 Misc. 202.

CLAIMS AGAINST ESTATE discussed, *supra*, page 131.

REFUND UNDER § 225 discussed in Matter of Hoople, 179 N. Y. 308; vide etiam Matter of Buckingham, 106 App. Div. 13-17; Matter of Von Post, 35 Misc. 367.

STATUTES

Present statute, *supra*, page 3.

Prior statutes arranged in chronological order *supra*, page 403.

Decedent Estate Law, *supra*, page 535.

Tax on transfers of stock, *supra*, page 564.

STEPCHILD

No mention of stepchild is made in the present statute.

Under Laws 1905, chap. 368, in effect June 1, 1905, stepchild was not in 1% class. Matter of Elizabeth W. Wheeler, 115 App. Div. 616; Matter of Hardner, 124 App. Div. 77; Matter of Stebbins, 52 Misc. 438.

By Laws 1907, chap. 204, in effect April 25, 1907, stepchild was put in 1% class, but by Laws 1908, chap. 310, in effect May 18, 1908, stepchild was not in 1% class unless coming within the definition of mutually acknowledged relation of parent and child.

The amendment by Laws 1911, chap. 732, in effect July 21, 1911, omits any reference to stepchild, so that a stepchild now comes within subdivision 2 of § 221a unless by reason of mutually acknowledged relationship of parent and child it brings itself within the provisions of subdivision 1 of § 221a.

Where will gave all decedent's property "to those persons, relatives of my full blood only, who would be entitled to receive my personal estate in case of my death unmarried and intestate," a nephew of testator, who was also a stepson, was taxed as a nephew and not as a stepson. *Matter of Linkletter*, 134 App. Div. 309.

STOCK

- | | |
|---------------------------------|-----------------------------------|
| (1) Resident estate. | (4) Decisions in non-resident es- |
| (2) Non-resident. | tates prior to 1911 amend- |
| (3) Non-resident prior to 1911. | ment. |

(1) Resident estate

In resident estate the transfer of stock in either domestic or foreign corporations is subject to tax. *Matter of Merriam*, 141 N. Y. 479-485, sustained in 163 U. S. 625, sub nom. *United States v. Perkins*; subdivision 1 of § 220 and third sentence of § 243.

The stock is subject to tax even though the certificate be without the state. *Matter of Bushnell*, 73 App. Div. 325-327, affirmed, without opinion, 172 N. Y. 649.

AS TO LARGE BLOCKS OF STOCK, vide page 115.

THE VALUATION OF STOCK is a question of fact. *Matter of Thayer*, 193 N. Y. 430-433.

Stock should be set forth in Schedule A⁴, *supra*, page 112. For discussion as to stock customarily bought and sold on the market vide pages 113 et seq.

UNLISTED STOCK discussed sub Closely Held Stock.

(2) Non-resident

In non-resident estates the transfer of stock is not taxable, even though it be of a New York corporation and the certificate of stock be physically located within the state at the time of decedent's death. Vide page 133.

(3) Non-resident prior to 1911 amendment

From the amendment by Laws of 1887, chap. 713, *Matter of*

Romaine, 127 N. Y. 80-84, *supra*, page 171, to the amendment by Laws 1911, chap. 732, *supra*, page 134, in effect July 21, 1911, the transfer of stock in New York corporation has been taxable in non-resident estate. A transfer of stock in non-resident estate made since the 1911 amendment is not subject to the tax.

(4) Decisions in non-resident estates prior to 1911 amendment

CERTIFICATES NOT WITHIN STATE subject to tax. Matter of Bushnell, *supra*.

FOREIGN CORPORATIONS, stock in, not subject to tax although certificates within state. Matter of James, 144 N. Y. 6; Matter of Bishop, 82 App. Div. 112-115.

JOINT-STOCK ASSOCIATION stock held by a non-resident decedent in American News Company taxable only on proportion of assets located in New York. Matter of Willmer, 153 App. Div. 804.

NATIONAL BANK located in New York a domestic corporation under provisions of subdivision 18 of § 3343, Code of Civil Procedure, and, prior to said 1911 amendment transfer of stock in non-resident's estate subject to tax. Matter of Cushing, 40 Misc. 505.

REORGANIZATION CERTIFICATES issued by a New York Trust Company re stock in foreign corporations not taxable. Matter of Rhoads, 190 N. Y. 525.

STOCK HELD IN ANOTHER'S NAME subject to tax. Matter of Newcomb, 172 N. Y. 608.

Stock in New York corporation taxed on basis of market value and not on proportion of assets in New York. Matter of Palmer, 183 N. Y. 238.

Stock in corporation organized under the laws of New York and other states should be appraised upon the basis of an apportionment of the property. Matter of Cooley, 186 N. Y. 220; Matter of Thayer, 193 N. Y. 430.

STOCK TRANSFER TAX

The statute relative to tax on transfers of stock is Article 12 of the Tax Law. It is set forth *supra*, page 564.

A transfer of stock from the name of the decedent to the executor, administrator or trustee of the estate does not require stock transfer stamps. U. S. Radiator Co. v. New York,

208 N. Y. 144-152. A transfer from the executor, administrator or trustee does require stock transfer stamps.

Decedent made a gift of stock to his sister a day or two previous to his death, being stricken with a fatal illness at the time. The Surrogate was about to enter a decree adjudging the sister and not the administratrix to be the owner of the stock, when it transpired that transfer stamps had not been affixed as required by § 270 of the Tax Law. The attorney for the sister thereupon claimed the right to and offered to affix stamp. Surrogate Heaton of Rensselaer, Matter of Raleigh, 75 Misc. 55, in disposing of the matter said: "Thus was raised the question whether the donee of corporate stock, claiming the title by gift *causa mortis* or *inter vivos*, can prove such gift in a case where the donor did not affix the proper stamps to the certificates at the time of the gift and delivery thereof. * * *

It must be held that no evidence of a gift or sale of stock, where the delivery of the certificate was made without the affixing of the required stamps *at the time of* the delivery, can be received. This results in making such a sale or gift impossible, whenever the defense that no stamp was affixed at the time of delivery of the certificate of stock is properly pleaded," citing *Blau v. Flint*, 138 App. Div. 846; *Mutual Life Insurance Co. v. Nicholas*, 144 id. 95, and *Sheridan v. Tucker*, 145 id. 145.

STORAGE BILLS

Vide Schedule B³, page 132.

STRICTLY CONSTRUED

Vide Doubt.

SUBMISSION OF CONTROVERSY

Vide Controversy.

SUBPŒNA

The "appraiser is authorized to issue subpœnas and to compel the attendance of witnesses before him and to take the evidence of such witnesses under oath." Second paragraph of § 230. Vide cases cited sub Contempt.

SUFFICIENCY OF EVIDENCE

Vide Burden of Proof; Laws of Another State; Testimony.

SUPERINTENDENT OF INSURANCE

"The value of every future or limited estate, income, interest or annuity dependent upon any life or lives in being, shall be determined by the rule, method and standard of mortality and value employed by the superintendent of insurance in ascertaining the value of policies of life insurance and annuities for the determination of liabilities of life insurance companies, except that the rate of interest for making such computation shall be five per centum per annum." Third paragraph of § 230.

The calculation is made by the superintendent of insurance under authority of the second paragraph of § 231. The representatives of the estate do not make the application; it is made by the surrogate or by the appraiser acting on behalf of the surrogate.

The computation is to be made on a 5% basis as provided by § 230, and not upon the interest actually to be received by the beneficiary. *Matter of Potter*, 199 N. Y. 561, *supra*, page 371. Vide cases cited sub Annuities and Life Estates.

SUPREME COURT

REAPPRAISAL may be ordered by justice of supreme court under the provisions of the second paragraph of § 232. Vide Reappraisal.

APPEAL from order made by surrogate on hearing of appeal under the provisions of the first sentence of § 232 should be taken to Appellate Division of Supreme Court. *Morgan v. Warner*, 45 App. Div. 424-426, affirmed, on opinion below, 162 N. Y. 612; etiam cases cited sub Appeal.

SUBMISSION OF A CONTROVERSY under § 1279 of Code of Civil Procedure, may be made. *Catlin v. Trustees of Trinity College*, 113 N. Y. 133; *Isham v. N. Y. Assn. for Poor*, 177 id. 218. Vide *Weston v. Goodrich*, 86 Hun, 194.

CONSTRUCTION OF WILL by Supreme Court involved question of whether inheritance tax should be paid by legatee or whether it should be paid out of residuary estate. The Court at Special Term discussed question and decided that the words "without any rebate or deduction whatever," did not refer to inheritance tax and that the tax should be paid by legatee and not out of residuary estate. *Jackson v. Tailer*, 41 Misc. 36, affirmed, without opinion, 184 N. Y. 603.

As to construction of will by Supreme Court vide etiam. *Matter of Edson*, 38 App. Div. 19, affirmed, on opinion below,

159 N. Y. 568; *Matter of Willets*, 119 App. Div. 119-126, affirmed, on opinion of surrogate, 190 N. Y. 527.

Vide *Mandamus*.

SURROGATE

THE SURROGATE ACTS IN A DUAL CAPACITY. By the first sentence of § 231 the surrogate is a taxing officer or appraiser. When a person is dissatisfied and seeks to review upon appeal the surrogate's order fixing the tax the appeal is not taken to an appellate court but is, under the first sentence of § 232, taken to the surrogate himself, who thereupon, "acting judicially," hears the appeal from his own order. *Matter of Costello*, 189 N. Y. 288-291; *Matter of Cora F. Barnes*, N. Y. Law Journal, December 17, 1913.

It is not plain what this roundabout method accomplishes. Its inconvenience is manifest, and it cannot be defended upon logic. Where the surrogate determines the "cash value" of an estate and the amount of tax to which the same is liable (§ 231) he affixes his signature to an order. If the order is not a proper one then the surrogate should not sign it. If he believes it to be an order in compliance with the law, there does not seem to be any good reason why he should be called upon to make a second order adjudging that his first order was correct. The responsibility of the first order is his (*Matter of Fuller*, 62 App. Div. 428-431), and as was said by Surrogate Varnum in *Matter of Kelly*, 29 Misc. 169-170, "it has been by no means unusual in this court to remit a proceeding to the appraiser" when the surrogate has not before him sufficient evidence upon which to make his order. The remitting of an appraiser's report by the surrogate has been held not to be appealable (*Matter of Astor*, 137 App. Div. 922), and therefore it is manifest that the surrogate is, by the present statute, put in the rather grotesque position of being asked by an appeal under § 232 if he really meant his decision to be final when he signed his name to the order appealed from.

JURISDICTION OF, IN RESIDENT estates, page 56. In **NON-RESIDENT estates**, page 137.

DECREE "binding upon the question of taxation only." *Amherst College v. Ritch*, 151 N. Y. 282-343.

CONSTRUCTION OF WILLS necessary. *Matter of Peters*, 69 App. Div. 465; *Matter of Turner*, 82 Misc. 25.

ON HIS OWN MOTION may order appraisal, page 72.

PETITION TO SURROGATE to appoint appraiser, page 74.

May act as appraiser, page 83.

May declare estate EXEMPT, page 84.

NOTICE of motion must be given, page 83.

ISSUANCE OF LETTERS NOT CONDITION PRECEDENT. Matter of Edgerton, 35 App. Div. 125-126, affirmed, without opinion, 158 N. Y. 671; Matter of Fitch, 160 N. Y. 87-91; Matter of Pullman, 46 App. Div. 574; Matter of Hubbard, 21 Misc. 566.

As to cases arising prior to amendment by chap. 399, Laws 1892 (now § 228) vide Matter of Embury, 154 N. Y. 746.

"The Court of Appeals, in Matter of Fitch, 160 N. Y. 87-91, held that where neither letters testamentary nor ancillary letters were applied for that fact is unnecessary to confer jurisdiction upon the surrogate to impose a tax upon the transfer of the property of a non-resident decedent. It must follow, therefore, that the issuing of letters testamentary or of administration upon the estate of a resident decedent is not necessary to give the surrogate jurisdiction." Opinion, dated April 16, 1913, of state comptroller, 2 State Department Reports, 497-500.

RESIDENT DONEE OF POWER OF APPOINTMENT. The surrogate of the county in which donee resided has exclusive jurisdiction. Matter of Seaver, 63 App. Div. 283.

May appoint an appraiser to ascertain whether estate taxable. Matter of O'Donohue, 44 App. Div. 186.

Under § 231 the surrogate from the appraiser's report "and *other proof*" shall "determine the cash value of all estates and the amount of tax to which the same are liable." Matter of Fuller, 62 App. Div. 428.

The words "OF COURSE" in § 231 construed to mean "that the surrogate is to proceed without intervention of any one when he has such report before him, and they relate to the practice rather than to the law." Matter of Fuller, *supra*.

NOT DISCRETIONARY WITH SURROGATE WHETHER AN APPRAISAL SHALL BE MADE, and mandamus will lie against him if he does not cause appraisal to be made upon petition being presented to him by state comptroller. Matter of Kelsey v. Church, 112 App. Div. 408.

NOTICE OF DETERMINATION of surrogate should be given as provided in § 231. Matter of Daly, 34 Misc. 148. Vide Notice of Appraisal.

About the time of the probate of the will of decedent the

executor filed an affidavit showing the net estate to be below the amount required for taxation purposes, and the surrogate thereupon gave his opinion that estate was not taxable. Held, that this was not binding upon comptroller, and that he was entitled to an official appraisal upon notice. *Matter of Schmidt*, 39 Misc. 77. Vide Notice of Appraisal.

NOT REQUIRED TO REMIT a proceeding for a rehearing, but may modify the order assessing tax. *Matter of Willets*, 190 N. Y. 527; *Matter of Havemeyer*, 32 Misc. 416-418.

DECREE FINAL unless appeal taken or decree vacated. Vide Appeal and Vacating Decree.

In the counties enumerated in § 234 the surrogate has power to recommend the appointment of TRANSFER TAX ASSISTANT CLERKS, and others set forth in said section, but comptroller cannot be compelled to act on recommendation of surrogate. *Matter of Duell v. Glynn*, 191 N. Y. 357.

AN EXECUTOR REFUSED TO ANSWER QUESTIONS regarding property of decedent on ground that decedent was non-resident, and the property inquired about was not subject to tax. Held, that there must be jurisdiction to tax established before surrogate can punish for contempt, and that question of residence of decedent must first be judicially determined. *Matter of Bishop*, 82 App. Div. 112. Vide *Matter of Whiting*, 69 Misc. 526-527, affirmed, 200 N. Y. 520.

Where it appears that surrogate has jurisdiction over non-resident's estate he MAY ISSUE COMMISSION under § 887 of Code of Civil Procedure to take testimony without state. *Matter of Wallace*, 71 App. Div. 284.

LAWS 1892, CHAP. 399, in effect May 1, 1892, increasing the jurisdiction of the surrogate in non-residents' estates held not to be retroactive. *Matter of Embury*, 154 N. Y. 746; *Matter of Pettit*, 171 N. Y. 654.

ALTHOUGH ESTATE DISTRIBUTED the surrogate still has jurisdiction to fix tax even though the property has been taken out of the state. *Matter of Hubbard*, 21 Misc. 566.

"THE DONEE OF THE POWER, a non-resident of this State, having exercised the power in connection with real estate situated in this county, the Surrogate's Court of this county has jurisdiction of the proceeding to assess a tax upon the transfer of the property passing by virtue of the exercise of the power of appointment." *Matter of Lowndes*, 60 Misc. 506-507.

SUSPENDING TAXATION

Vide Time of Tax.

TABLES

Exemptions under § 221, page 40.

Persons entitled to the lower rates of subdivision 1 of § 221*a*, page 45.

Rates of tax, pages 48 to 51.

Prorating of tax in non-resident estate, page 151.

Method employed by superintendent of insurance in determining values as provided in the second sentence of § 231, page 581.

TAXES

No deduction allowed for taxes where decedent dies before books closed for correction. *Matter of Freund*, 143 App. Div. 335, affirmed, 202 N. Y. 556; *Matter of Maresi*, 74 App. Div. 76-79; distinguished in *Matter of Liss*, 39 Misc. 123-125.

But where "so far completed that the name of the person named as owner cannot be changed or altered by the assessment officers," they are proper deductions. *Matter of Hoffman*, 42 Misc. 90-92, citing *Matter of Babcock*, 115 N. Y. 450, and subdivision 2 of § 2719 of Code of Civil Procedure.

NEW YORK CITY personal taxes assessed against the testator for the year 1912 were allowed as a deduction from the assets of the estate of a decedent who died November 7, 1911. *Surrogate Cohalan, Matter of Henry Dormitzer*, N. Y. Law Journal, February 6, 1913, saying: "The amount of personal taxes assessed against the decedent was a valid indebtedness of his estate at the date of his death and the appraiser erred in refusing to deduct the amount of such taxes from the assets of the estate."

IN ALLEGANY COUNTY it was held that there should be deduction for taxes where "the assessment was made against deceased and was binding upon him, although the precise amount of the tax had not been ascertained until the warrants were delivered to the collectors." *Matter of Brundage*, 31 App. Div. 348-350, citing *Matter of Babcock*, 115 N. Y. 451, and *Rundell v. Lakey*, 40 N. Y. 513.

FEDERAL INHERITANCE tax not to be deducted. *Matter of Gihon*, 169 N. Y. 443.

FOREIGN STATE inheritance tax not to be deducted. *Matter*

of Kennedy, 20 Misc. 531; Matter of Penfold, 142 N. Y. Supp. 678.

TEMPORARY ADMINISTRATOR

Fees and expenses of, allowable as a deduction. Matter of Gihon, 169 N. Y. 443-445.

TEMPORARY ORDER

Where tax shall be imposed at the "highest rate" pursuant to the provisions of the sixth paragraph of § 230, a temporary order shall be entered by the surrogate. Vide opinion of state comptroller cited sub Interest.

TEMPORARY PAYMENT

Vide Payment of Tax.

TENANCY IN COMMON

Tenancy in common created where devise to two or more persons, in their own right, unless expressly declared to be joint tenancy. Matter of Kimberly, 150 N. Y. 90; Matter of Eldridge, 29 Misc. 734.

Vide Deductions, *supra*, page 658, as to advancements made by cotenant.

TENANTS BY THE ENTIRETY

If real estate is held by husband and wife as tenants by the entirety and one dies there is no tax as the transfer is not within the statute. There is no reported decision in a transfer tax case, but the practice is not to tax. For discussion of the taxable transfer vide *supra*, page 33.

It is good practice to set out in Schedule A¹ real estate held by tenancy by the entirety, at the same time making the claim for exemption and stating the facts upon which claim is based.

Certain real estate owned by decedent and her husband as tenants by the entirety, was sold and conveyed, and a purchase money mortgage for \$30,000 taken in their joint names, and a cash payment of \$12,750 of the purchase price deposited in the Union Trust Company in decedent's name, solely, the husband claimed, for the purpose of being re-invested in real estate to be held in the same manner as that which they had sold. Held by Surrogate Hopkins, Dutchess County, in Matter of Thompson, 81 Misc. 86, that one-half of the cash and one-half of the

purchase money mortgage were taxable in the wife's estate, and that the husband, "as survivor, was not entitled to the whole proceeds on her death, without legal evidence of agreement or gift. *Matter of Baum*, 121 App. Div. 496; *Matter of Albrecht*, 136 N. Y. 91."

Vide *Matter of Anna Quinn*, N. Y. Law Journal, November 25, 1911, opinion quoted *supra*, page 801, and other cases cited sub Property Held in Trust or Jointly.

TESTIMONY

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|--|---------------------------------------|
| (1) Appraiser authorized to take testimony. | (4) Objection should be taken. |
| (2) Cannot assess tax upon suspicion. | (5) Surrogate may take testimony. |
| (3) Incompetent evidence should be excluded. | (6) § 829 of Code of Civil Procedure. |
| | (7) § 837 of Code. |

Vide Burden of Proof; Expert; Gifts; Laws of Another State or Country; Ownership of Property; Stock Transfer Tax.

(1) Appraiser authorized to take testimony

The appraiser is authorized by the second paragraph of § 230 "to issue subpoenas and to compel the attendance of witnesses before him and to take the evidence of such witnesses under oath." *McKnight v. Glynn*, 56 Misc. 35-39, and other cases cited sub Appraiser.

The large majority of transfer tax proceedings are decided upon affidavit without the taking of testimony. Vide pages 85 et seq.

(2) Cannot assess tax upon suspicion

"Any apparent attempt, however, upon the part of the executors to evade the payment of a just tax, however reprehensible it may be, does not authorize either the appraiser or surrogate to make an assessment upon suspicion or otherwise than upon convincing evidence of the transfer of property for which the tax is imposed by the statute." *Matter of Kennedy*, 113 App. Div. 4-8.

IN *MATTER OF DUDLEY*, N. Y. Law Journal, March 4, 1913, Surrogate Fowler remitted report, saying: "As the only evidence before the appraiser in regard to the value of decedent's holdings of stock in the Pere Marquette Railroad Company shows that the cash value of the stock at the time of decedent's

death was \$16.25 a share, the appraiser erred in estimating the value of such stock at \$29.50 per share."

(3) Incompetent evidence should be excluded

INDEFINITE AND INCOMPETENT testimony taken by appraiser does not enable surrogate to pass upon the record, and will result in report being remitted. *Matter of Froehlich*, N. Y. Law Journal, April 30, 1913, opinion quoted sub *Closely Held Stock*, page 623.

Surrogate Baker of Yates County commenting on testimony taken in *Matter of Jones*, 65 Misc. 121-123, said it was "mostly incompetent evidence and would not have been received upon a hearing where some attention was given to the rules of evidence, and it should be carefully scrutinized."

FACTS NOT CONCLUSIONS. Report remitted in *Matter of Georgiana C. Stone*, N. Y. Law Journal, February 18, 1911, Surrogate Cohalan saying: "It must appear positively by the evidence of some one possessed of actual knowledge that the bonds and mortgages on property in the City of New York were actually located in New Jersey at the date of decedent's death. The allegation in the affidavit attached to the appraiser's report that such bonds were habitually kept in decedent's safe deposit box in Hoboken, New Jersey, is insufficient. The appraiser's report will be remitted to him for further testimony on this point."

OPINION of officer of company as to value of stock, the basis of opinion not being given, not sufficient to justify appraiser in adopting opinion in appraisal of stock. *Matter of Bolton*, 35 Misc. 688.

As to stock customarily bought and sold on the market, vide page 112. As to inactive securities, vide page 627.

(4) Objection should be taken

Failure to take objection estops comptroller from urging objection on appeal. *Morgan v. Warner*, 162 N. Y. 612, *supra*, page 237.

IN MATTER OF YERKES, N. Y. Law Journal, December 5, 1912, it was held by Surrogate Fowler, that: "While the State Comptroller was not made a party to the compromise agreement executed between the executors and the widow of decedent in the matter under consideration he appeared before the appraiser and made no objection to the introduction in evidence

of a copy of the compromise agreement. Neither did he object to that part of the report of the appraiser where the distribution to the widow was made not in accordance with the provisions of the will of the decedent, but in accordance with the terms of the compromise agreement. Such a failure on the part of the attorney for the State Comptroller to object to the compromise agreement must be deemed an acquiescence in its validity so far as the imposition of the transfer tax is concerned."

FAILURE TO TAKE EXCEPTION WAS DISREGARDED by Appellate Division in *Matter of Brundage*, 31 App. Div. 348 (Fourth Department), the court saying at page 353: "We think the error of the appraiser in rejecting the evidence ought not to be disregarded, although there was no formal exception taken to the exclusion of the evidence. This record comes to us on an appeal from all the proceedings, and not upon formal case and exceptions. It is a case where the court can see that the ruling may have been very prejudicial to the appellant, and we ought not, therefore, to say that an exception is indispensable to a review of the errors committed during the hearing before the appraiser. (*Dovale v. Ackerman*, 11 Misc. Rep. 248, and cases cited.)"

(5) Surrogate may take testimony

Surrogate may take testimony upon appeal to him from his pro forma order. *Matter of Westurn*, 152 N. Y. 93-104; *Matter of Thompson*, 57 App. Div. 317; *Matter of Bentley*, 31 Misc. 656-657. As to powers of surrogate vide cases cited sub Surrogate.

(6) § 829 of Code of Civil Procedure

Section 829 of the Code of Civil Procedure provides that "upon the trial of an action or the hearing upon the merits of a special proceeding, a party or a person interested in the event, * * * shall not be examined as a witness, in his own behalf or interest, or in behalf of the party succeeding to his title or interest, *against* the executor, administrator or survivor of a deceased person, or the committee of a lunatic, or a person deriving his title or interest from, through or under a deceased person or lunatic, by assignment or otherwise; concerning a personal transaction or communication between the witness and the deceased person or lunatic," with an exception not necessary to be here noted.

IN MATTER OF JAY GOULD, 19 App. Div. 352, the testator in his will said (156 N. Y. 423-425): "My beloved son George J. Gould having developed a remarkable business ability, and having for twelve years devoted himself entirely to my business, and during the past five years taken entire charge of all my difficult interests, I hereby fix the value of said services at five millions of dollars." The question arose as to whether this five millions of dollars was subject to the tax. The Appellate Division in referring to the position taken by the state comptroller said, page 354: "He insists that the legacy in question was not given in payment of any legal debt, but was a gift or gratuity from decedent, and liable as such to taxation. The question raised, therefore, is one of fact, and we are to inquire whether the appraiser properly determined that this legacy was given in payment of a debt owing by decedent at the time of his death. A part of the evidence given on this subject before the appraiser was that of the alleged creditor, George J. Gould, as to personal interviews between himself and the decedent, his alleged debtor, and it is claimed this evidence was improperly received under the comptroller's objection, based upon SECTION 829 OF THE CODE OF CIVIL PROCEDURE. We do not think this objection was well taken.

"This was not a proceeding by the witness against the estate wherein he sought to establish his claim against the estate. It was a proceeding to ascertain the value of property of the estate for the purpose of taxation under the statute. The witness was, of course, interested in the event of this proceeding. He was not only a residuary legatee, and interested as such in the amount of the tax to be levied upon such residuary estate, but he was the legatee to whom this particular legacy was given, and if the legacy was taxable the tax would have to be paid by him or from the legacy itself.

"We fail to see, however, how it can be said that the witness was examined against the executors of the decedent, or any person deriving title or interest from, through or under the decedent, by assignment or otherwise. He was not examined as a witness against the executors, but in their favor. They claimed the legacy was a debt and not a gift or a gratuity. He was not examined as a witness against anyone deriving title or interest from, through or under the decedent, because the tax was not upon the deceased's interest in the property, nor was it to be paid from such interest. It was a tax upon the interests

of the legatees under the will, and was payable out of their respective interests as such legatees. The estate as an estate, had no interest whatever in the amount of the tax. The legatees alone were the interested parties. (*In re Hoffman*, 143 N. Y. 327.) We think the witness was not incompetent under section 829 of the Code of Civil Procedure."

The Court of Appeals, 156 N. Y. 423, held that the transfer of the five millions of dollars was subject to the tax, saying at page 427: "If Jay Gould did owe his son George \$5,000,000 for services, and we must assume that he did, he selected a method of payment which brought the transaction within the taxing provisions of the statute." Holding that the transfer was subject to a tax, even though in payment of a debt, it was not necessary for the Court of Appeals to pass upon the competency of the testimony in question.

IN MATTER OF BRUNDAGE, 31 App. Div. 348-353, *Matter of Gould*, *supra*, was quoted and followed. Vide etiam *Matter of Bentley*, 31 Misc. 656.

IN MATTER OF THOMPSON, 81 Misc. 86-87, Surrogate Hopkins says: "To accept the sole testimony of a witness directly interested in the result in proceedings of this character would absolutely nullify the transfer tax law and open the door for the prevention of the imposition of any tax in all similar cases. Such evidence would be inadmissible in any court against the estate of a deceased person, relative to any agreement, transaction, or understanding between the witness and such deceased person, affecting the disposition of the estate or the interest of the witness therein, and such rule should be applied in proceedings of this kind." Vide etiam *Matter of Sharer*, 36 Misc. 502 (Herkimer County).

It does not appear that in *Matter of Thompson*, *supra*, the surrogate had before him the rulings in the *Brundage*, *Gould* and *Bentley* cases, *supra*. It would seem that his decision is more of an authority as to the weight to be given such evidence than as to the competency of such evidence.

In *Matter of White*, 116 App. Div. 183-185, Justice Houghton in a dissenting opinion says: "A legatee or distributee is not prohibited by this section (829) from testifying to personal transactions and communications had with his testator or intestate in a proceeding to appraise property under the Transfer Tax Act. (*Matter of Gould*, 19 App. Div. 352; *Matter of Brundage*, 31 id. 348.)

"The above authorities on this proposition do not seem to have been overruled or questioned, and they appear to be founded on just principles. * * * Her (the witness) interest might affect the weight of her testimony, but did not render her incompetent, for she was not testifying against the estate or the executors of the will."

The prevailing opinion dismissed the transfer tax proceeding so that the dicta just quoted was neither assented to or disagreed with in the prevailing opinion.

For discussion of § 829 in cases not affecting transfer tax vide *Matter of Hennessey*, 157 App. Div. 136; *Matter of Porter*, 60 Misc. 504; *Hoag v. Wright*, 174 N. Y. 36-39.

MATTER OF HARTMAN, N. Y. Law Journal, October 8, 1913, was a proceeding for the judicial settlement of the account of an executrix. She had paid certain claims to her husband William G. Mulligan, which were objected to by the widow of the testator. Surrogate Fowler in the course of his opinion said: "In a proceeding of this character, the accountant executrix, who has paid bills of the kind objected to is in law, held incompetent to testify to a conversation between the payee and the deceased, if she seek to be allowed the payment of such bills (sec. 829, Code Civ. Pro.; *Matter of Smith*, 153 N. Y. 124; *Matter of Knibbs*, 108 App. Div. 134). But it has been held that the PARTY WHOSE CLAIM IS PAID is competent to testify, as he is not a party to the proceeding or interested in the event, nor does the executrix derive title through or under such creditor (sec. 829, Code Civ. Pro.; *Glennan v. Rochester Trust, &c., Co.*, 136 N. Y. Supp. 747; *Matter of Fraser*, 92 N. Y. 239). I was at some pains to follow these precedents on the hearing, although to my mind both Mr. and Mrs. Mulligan would have been incompetent as witnesses at common law, which seems to me to afford the more just rule.

"The Code and the rulings of our courts thereon have, however, rendered Mr. Mulligan competent to give evidence of these transactions with the late Mr. Hartmann, and these rulings I obeyed. But Mr. Mulligan's testimony is insufficient of itself. He is virtually the claimant against the dead man's estate, and the unsupported testimony of claimants is generally regarded as insufficient in such cases. (*Beckett v. Ramsdale*, L. R., 7, Ch. D. 177.)"

(7) § 837 of Code

Vide last paragraph of digest of Matter of Lord, 186 N. Y. 549, *supra*, page 332.

TIME OF TAX

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| (1) Statutory provisions. | (4) Payable at death except in certain cases. |
| (2) Time of transfer. | |
| (3) Transfer under subdivision 4 of § 220. | (5) Unascertained claim. Interest in estate of another. |
| | (6) Suspending taxation. |

(1) Statutory provisions

The first two sentences of § 222 read: "All taxes imposed by this article shall be due and payable at the time of the transfer, except as herein otherwise provided. Taxes upon the transfer of any estate, property or interest therein limited, conditioned, dependent or determinable upon the happening of any contingency or future event by reason of which the fair market value thereof can not be ascertained at the time of the transfer as herein provided, shall accrue and become due and payable when the persons or corporations beneficially entitled thereto shall come into actual possession or enjoyment thereof." Matter of Babcock, 37 Misc. 445, affirmed, without opinion, 81 App. Div. 645; Matter of Granfield, 79 Misc. 374-381; Matter of White, 208 N. Y. 64-67, *supra*, page 390.

The sixth paragraph of § 230 provides, inter alia: "When property is transferred in trust or otherwise, and the rights, interest or estates of the transferees are dependent upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended or abridged, a tax shall be imposed upon said transfer at the highest rate which, on the happening of any of the said contingencies or conditions, would be possible under the provisions of this article, and such tax so imposed shall be due and PAYABLE FORTHWITH by the executors or trustees out of the property transferred, and the surrogate shall enter a temporary order determining the amount of said tax in accordance with this provision." Matter of Vanderbilt, 172 N. Y. 69, *supra*, page 268; Matter of Brez, 172 N. Y. 609, *supra*, page 271; Matter of Tracy, 179 N. Y. 501, *supra*, page 292; Matter of Billingsley, 1 State Department Reports, 569, *supra*, page 725.

It is provided by the fifth paragraph of § 230: "Where any property shall, after the passage of this chapter, be transferred subject to any charge, estate or interest, determinable by the

death of any person, or at any period ascertainable only by reference to death, the increase accruing to any person or corporation upon the extinction or determination of such charge, estate or interest, shall be deemed a transfer of property taxable under the provisions of this article in the same manner as though the person or corporation beneficially entitled thereto had then acquired such increase from the person from whom the title to their respective estates or interests is derived." *Matter of Maresi*, 74 App. Div. 76-78.

For discussion of the meaning and intendment of the seventh paragraph of § 230, vide *Matter of Kennedy*, 93 App. Div. 27.

As to the provisions of subd. 6 of § 220 relative to exercise of power of appointment, vide *Matter of Howe*, 176 N. Y. 570, *supra*, page 284, and cases cited sub **POWER OF APPOINTMENT**, *supra*, page 768.

(2) Time of transfer

Vide *supra*, page 37, etiam cases cited sub **Payment of Tax**, *supra*, page 757.

(3) Transfer under subd. 4 of § 220

Vide *Matter of Webber*, 151 App. Div. 539, and cases cited *supra*, page 35. As to rate of tax where there are transfers by deed of trust and by will to the same beneficiaries, vide *Matter of Agnew*, N. Y. Law Journal, December 13, 1913, *supra*, page 53.

(4) Payable at death except in certain cases

The general rule is that the tax is due and payable as at death of decedent. *Matter of White*, 208 N. Y. 64-68, *supra*, page 390; *Matter of Vassar*, 127 N. Y. 1-8, *supra*, page 169. As to interest and discount vide **INTEREST**, *supra*, page 721.

For discussion as to trust and life estates vide **REMAINDERS**, *supra*, page 817, and **POWER OF APPOINTMENT**, *supra*, page 768.

The fact that the **PUBLIC ADMINISTRATOR** is in possession of property of intestate and that the next of kin are unknown, does not justify suspending taxation. *Matter of Lind*, 196 N. Y. 570, *supra*, page 369.

(5) Unascertained claim

IN *MATTER OF EMILIA C. DE SALA*, N. Y. Law Journal, July 20, 1912, Surrogate Cohalan held: "The decedent died in 1905. The transfer tax appraiser who was designated to appraise

his estate reported that owing to the unsettled conditions existing in the Republic of Santo Domingo he could not determine the value of decedent's interest in the firm of Sala & Company, the assets of the said firm consisting largely of securities of the Republic of Santo Domingo and debts due the firm from citizens of that country. The order entered upon the report did not make any reference to the inability of the appraiser to ascertain the value of decedent's interest in the firm of Sala & Company, nor did it refer in any way to the appraiser's finding in regard to said interest.

"The State Comptroller now asks that an appraiser be designated to appraise the value of decedent's interest in the said firm: The attorneys for the executors contend that the State Comptroller is not entitled to such an order, because the omission from the order entered upon the report of a clause suspending taxation upon the value of such interest constituted a determination that such interest was not taxable. As the appraiser's report contains a finding that it was impossible at that time to ascertain the value of decedent's interest in the firm of Sala & Company, the omission from the order of any reference to this finding did not constitute an adjudication that the interest was not subject to taxation. *Matter of Pear-sall*, N. Y. Law Journal, July 9, 1912.

"As the circumstances at the time of the appraisal were such that the value of decedent's interest in the firm of Sala & Company could not be ascertained by the appraiser, the Surrogate could, at any time subsequent to the filing of the appraiser's report, designate an appraiser for the purpose of appraising the value of such interest. *Matter of Crerar*, 56 App. Div. 479. The petition of the State Comptroller, however, does not allege that since the filing of the appraiser's report he has obtained such knowledge or information as would enable an appraiser to estimate the value of decedent's interest in the firm of Sala & Company, or that such information is in the possession of parties whose testimony could be procured by the appraiser. In other words, the petition of the State Comptroller does not allege the discovery of any facts since the filing of the appraiser's report which, if presented to the appraiser, would enable him to appraise the value of decedent's interest in the said firm. In the absence of such allegations it would be an ineffective and useless proceeding to designate an appraiser for the purpose of appraising property the value of which was unascertainable by

the appraiser previously designated. The application of the State Comptroller will therefore be denied, but with leave to renew upon papers containing allegations as herein indicated."

UNCERTAIN INTEREST IN ESTATE OF ANOTHER. In *Matter of Sterry*, N. Y. Law Journal, April 30, 1912, it was held that as the value of the interest of decedent in the estate of his father "could not be determined until the termination of the legal proceedings instituted for that purpose, the transfer tax did not accrue January 4, 1911, the date when the value of this interest was ascertained and paid." Vide etiam *MATTER OF ZEFITA*, 167 N. Y. 280-283; *MATTER OF CLINCH*, 180 N. Y. 300-303, *supra*, page 301.

In *MATTER OF FREDERICK A. GANS*, N. Y. Law Journal, April 13, 1912, Surrogate Fowler held: "This is an application to amend the order fixing tax heretofore entered in this estate by including certain assets discovered since the entry of the original order. The decedent, who was a resident of this State, died in 1890. In 1911 the administrator, c. t. a., of his estate received from the executors of his father's estate the sum of \$2,456.07. Decedent's father was a resident of Switzerland. The administrator also received the sum of \$4,788.40 from an insurance company, this amount representing decedent's interest in a certain policy of insurance which had been assigned to his father. The administrator admits that the latter sum is taxable, but contends that the amount to which the decedent was entitled as a residuary legatee under the will of his father is not taxable.

"The interest of decedent in his father's estate could not be taxed at the time of decedent's death because its value was not then ascertainable, but it became taxable as soon as its value could be definitely determined. *Matter of Swift*, 137 N. Y. 77; *Matter of Clinch*, 180 N. Y. 300. The order fixing tax will be amended by including the amounts above mentioned in the taxable assets of decedent's estate. Settle order on notice."

INTEREST OF BENEFICIARY IN ESTATE IN LITIGATION, an appeal having been taken from judgment of Supreme Court determining beneficiary's interest. *Matter of Lansing*, 31 Misc. 148-156. Etiam *Matter of Newcomb*, 35 Misc. 589.

As to when interest of decedent in estate of another decedent taxable presently. Vide *Matter of Huber*, 86 App. Div. 458.

Vide etiam *SCHEDULE A*⁶, *supra*, page 121.

(6) Suspending taxation

Report of appraiser and order of taxation should also suspend taxation in cases of

ASSET IN LITIGATION, *Matter of Westurn*, 152 N. Y. 93-103, *supra*, page 212; *Matter of Skinner*, 106 App. Div. 217.

CLAIMS FOR DEDUCTIONS of doubtful and uncertain claims against estate. *Matter of Morgan*, 36 Misc. 753; *Matter of Rice*, 56 App. Div. 253; *Matter of Dimon*, 82 App. Div. 107.

Vide etiam *Matter of Burgess*, 204 N. Y. 265, *supra*, page 380, and cases cited sub POWER OF APPOINTMENT, *supra*, page 768, and *Matter of Granfield*, 79 Misc. 374-381, and cases cited sub REMAINDERS.

TITLE OF PROCEEDING

Vide *supra*, page 74.

Surrogate Beckett in *MATTER OF LOWNDES*, 60 Misc. 506 (1908), said: "The proceeding should be amended by entitling it 'In the Matter of the Transfer Tax upon the Trust Created by the Will of Gertrude L. Lowndes, Deceased, for the Benefit of Annie L. Chase and Her Appointees or Heirs.'" The proceeding was brought to tax transfer by will of Annie L. Chase of property over which she had power of appointment given her by will of Gertrude L. Lowndes.

IN *MATTER OF CATHARINE G. LEEDS*, N. Y. Law Journal, April 23, 1913, Surrogate Fowler apparently modified the practice as laid by Surrogate Beckett in the Lowndes case, *supra*. In his opinion he said: "This is an application to exempt a certain trust fund from taxation. The application is entitled 'In the matter of the transfer tax of the trust fund held for the benefit of Catharine G. Leeds, deceased, under the will of Roe Lockwood, deceased.'"

"Roe Lockwood died in 1870 and was survived by his widow, Julia G. Lockwood; his four daughters, Catharine G. Leeds, Elizabeth R. Griffin, Julia Leeds and Louisa M. Seward, and his son, George R. Lockwood. Julia Leeds died during the lifetime of her mother without leaving issue. The will of Roe Lockwood provided that his residuary estate should vest in trustees, one-third of the income to be paid to his widow during her life and the remaining two-thirds to be paid to his children. It further provided that upon the death of the widow one-fourth of the residuary estate was to be given absolutely to his son, George R. Lockwood, if he were then living, but that if he had

died before his mother, then each of the parts into which he directed his estate to be divided should be held in trust for his daughters, the income from one part to be paid to each of them during their respective lives, and upon the death of each daughter the corpus of her share of the trust fund to be paid to her heirs, executors, administrators and assigns. George R. Lockwood survived his mother, and as the will contained no provision for the distribution of the estate in the event of his surviving the life tenant, the children of Roe Lockwood entered into an agreement by which the residuary estate was conveyed to a trustee, with directions that the income from one-quarter thereof should be paid to each of the children during their respective lives, and upon the death of either of them his or her share of the corpus of the trust fund to be paid to his or her heirs, executors, administrators and assigns. This trust agreement was executed on the 13th of January, 1896. Catharine G. Leeds, one of the daughters of Roe Lockwood, died on the 9th of February, 1913. In the proceeding under consideration the attorney representing the heirs of Catharine G. Leeds, deceased, contends that the property constituting the trust fund passed to the heirs of Catharine G. Leeds by virtue of the provisions of the will of Roe Lockwood and not under the trust agreement made between the legatees named in his will and that it is therefore exempt from taxation.

"The State Comptroller contends that the property passed by virtue of the trust agreement entered into between the legatees mentioned in the will of Roe Lockwood, and as this agreement was executed in 1896 such transfer is subject to the provisions of the Transfer Tax Law in force at that time. THE STATE COMPTROLLER ALSO CONTENDS that as a proceeding is now pending before a transfer tax appraiser for the purpose of determining the transfer tax upon the estate of Catharine G. Leeds, deceased, this application should be dismissed and that the appraiser should inquire into the taxability of all the property alleged to belong to Catharine G. Leeds at the time of her death and which was transferred either by her will or by virtue of any deed of trust executed by her.

"If the property passed to the heirs of Catharine G. Leeds by virtue of the provisions of the will of Roe Lockwood, its transfer is not subject to a transfer tax, as he died prior to the enactment of our transfer tax statute. The title of the proceeding therefore should not include the name of Roe Lockwood, as no question

could arise as to the taxability of the property if it were conceded that it belonged to Roe Lockwood and was transferred under his will. If, on the other hand, the trust agreement executed by the legatees mentioned in the will of Roe Lockwood is the source from which the heirs of Catharine G. Leeds obtained their title to her share of the trust fund, then the transfer of that property would be subject to a tax in accordance with the provisions of the Transfer Tax Law in existence at the date of the execution of the trust deed. But it would be taxable as part of the estate of Catharine G. Leeds, not as part of the estate of Roe Lockwood.

"While technically it may not constitute a part of the estate of Catharine G. Leeds at the time of her death, the word estate in the title of the transfer tax proceeding is used in a general sense and comprehends all property passing to beneficiaries or legatees either under the will of Catharine G. Leeds or by virtue of any deed of trust executed by her.

"THE ORDERLY AND ECONOMICAL ADMINISTRATION of the transfer tax statute requires that all questions arising in connection with the taxability of the assets of an estate should be determined in one proceeding, and, where an appraiser has been designated, all the evidence tending to sustain the contentions of the parties should be submitted to him so that his report may contain a complete record of the proceeding. Such is the practice of this court. Therefore the taxability of the interest of Catharine G. Leeds in the corpus of the trust fund which passed upon her death to her heirs should be determined in the proceeding now pending before the appraiser for the purpose of appraising the assets of her estate under the provisions of the Transfer Tax Law. The application for exemption is therefore denied, but without prejudice to the right of the heirs and legatees of Catharine G. Leeds to raise this question before the appraiser in the proceeding now pending before him to determine the tax upon the estate of Catharine G. Leeds, deceased."

THE PRESENT PRACTICE in New York County is to include in one proceeding the appraisal of the assets of the decedent, and also all property passing under an exercise of a power of appointment by decedent. Subdivision 6 of section 220.

IN MATTER OF MARY C. TOMPKINS, N. Y. Law Journal, August 11, 1913, Surrogate Cohalan held: "As the power of appointment was exercised by William H. Tompkins, the property transferred by virtue of the exercise of such power is tax-

able as part of his estate (subdiv. 6, sec. 220, Tax Law; Matter of Leeds, N. Y. Law Journal, April 23, 1913)."

TOMBSTONE

Reasonable amount expended for tombstone will be allowed as a deduction. Matter of Edgerton, 35 App. Div. 125-131, affirmed, without opinion, 158 N. Y. 671; Matter of Maverick, 135 App. Div. 44, affirmed, without opinion, 198 N. Y. 618.

It is the practice to require an affirmative statement that the tombstone has either been paid for or contracted for. The claim for deduction should be made under Schedule B¹, *supra*, page 124.

TRANSFER

For discussion of the taxable transfer vide page 33.

TRANSFER OF SECURITIES

Section 227 provides that the consent of the state comptroller should be obtained before the assignment, transfer or delivery of securities, deposits or other assets, under the terms of said section 227.

Application for consent to transfer securities, page 69.

Partnership assets, page 753.

Practice on opening of safe deposit box, page 57.

Ruling of comptroller, page 65.

Separate consents issued, page 70.

Waiver for opening safe deposit box, page 60 and page 70.

Vide opinion in *People v. Mercantile Safe Deposit Company* quoted *supra*, page 837.

Non-resident estates

IN *DUNHAM v. CITY TRUST COMPANY* of New York, 115 App. Div. 584, affirmed, without opinion, 193 N. Y. 643, it was held that in a non-resident estate where the transfer of stock was not taxable it was not necessary to obtain consent of state comptroller under § 227. The suit arose upon a claim for damages made against the transfer agent for failure to transfer the stock, the transfer agent delaying the transfer until it should receive the consent of the state comptroller. For facts of case and opinion vide page 356.

As to practice in non-resident estate vide page 135.

TREATY

The tax "is not a deduction tax, but a succession tax." The alien "is treated precisely the same as our own citizens are treated, receiving precisely what they receive. He certainly ought not to be entitled to receive more than they do. All that is granted to him by the treaty is that the property to which he succeeds shall not be taxed when he comes to take the property or its proceeds out of the State." *Matter of Strobel*, 5 App. Div. 621; the opinion of Surrogate Arnold, which the Appellate Division affirms, is reported in 39 N. Y. Supp. 169. The treaty involved in this case was the 1844 treaty with Wurttemberg.

TRIFLING MISTAKES

Will be disregarded by Appellate Court. *Matter of Manning*, 169 N. Y. 449-451.

TRUST DEED

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| (1) Definition. | (6) Property without state when trust deed executed not taxable although within state at grantor's death. |
| (2) Taxable when income reserved to grantor. | (7) Remainder not taxable where trust deed executed prior to enactment of statute. |
| (3) Masury and Bostwick cases distinguished. | |
| (4) The Schermerhorn case. | |
| (5) The law in existence at the time deed of trust executed governs. | |

(1) Definition

For discussion of definition of transfer taxable under provision of subdivision 4 of § 220 vide page 35. For transfers, other than by trust deed, coming within the purview of said subdivision vide *Contemplation of Death and Gift*.

(2) Taxable when income reserved to grantor

In *MATTER of KEENEY*, 194 N. Y. 281, sustained in 222 U. S. 525, sub nom. *Keeney v. New York*, Chief Justice Cullen in holding that transfer was taxable said, page 286: "A not wholly unnatural desire exists among owners of property to avoid the imposition of inheritance taxes upon the estates they may leave, so that such estates may pass to the objects of their bounty unimpaired.

"IT IS A MATTER OF COMMON KNOWLEDGE that for this purpose trusts or other conveyances are made whereby the

grantor reserves to himself the beneficial enjoyment of his estate during life. Were it not for the provision of the statute which is challenged, it is clear that in many cases the estate on the death of the grantor would pass free from tax to the same persons who would take it had the grantor made a will or died intestate."

For other Court of Appeals cases holding that transfer by trust deed is taxable where grantor reserved to himself an interest in the property vide the decisions, arranged chronologically, *supra*, page 216, in *Matter of Green*, 153 N. Y. 223; *Matter of Masury*, 159 id. 532; *Matter of Bostwick*, 160 id. 489; *Matter of Cruger*, 166 id. 602; *Matter of Patterson*, 204 id. 677; etiam, *Matter of Ogsbury*, 7 App. Div. 70; *Matter of Webber*, 151 id. 539; *Matter of Skinner*, 45 Misc. 559, modified on other points in 106 App. Div. 217.

(3) *Masury and Bostwick cases distinguished*

The principles of the cases of *Matter of Masury* and *Matter of Bostwick* applied by Surrogate Fowler, in *Matter of Smith Ely*, N. Y. Law Journal, March 6, 1912, the surrogate saying: "This is an application by the trustee of a trust fund to have the corpus of the trust fund declared exempt from taxation under the Transfer Tax Law.

"The decedent, who was a resident of New York, died on the 1st of July, 1911. On the 17th of October, 1904, he executed a trust deed by which he granted and transferred to the United States Trust Company of New York, as trustee, 100 shares of the preferred stock of the American Chiclé Company, the income therefrom to be applied to the use of Minnie E. Leo during her life, and upon her death the said income to be applied to the use of her daughter, Essie B. Leo, during her life, and upon the death of the survivor the corpus of the trust fund to be transferred and delivered to the issue of Essie B. Leo her surviving. The trust deed further provided that the grantor could at any time during his lifetime, by a writing filed with the trustee, revoke, annul or amend the trust and receive back as his absolute property the said shares of stock or the investments or property constituting the trust fund. The decedent did not exercise the power reserved to him to amend, annul or revoke the said deed or trust.

"In the *Matter of Masury* (28 App. Div. 580, aff'd, without opinion, 159 N. Y. 532) one of the deeds of trust executed by the

decedent provided that the income be paid to the guardian of the donor's grandson during the minority of the grandson, and that the corpus of the trust fund should be paid to the grandson in 1904. The deed also contained a clause authorizing the grantor to revoke or annul the same during his lifetime. The court held that the property granted and transferred by the deed of trust was not taxable under the provisions of the Transfer Tax Law. In the Matter of Bostwick (160 N. Y. 489) the decedent executed certain deeds of trust in which he reserved to himself during his lifetime the power to alter or amend the deeds of trust, to withdraw any portion of the trust property or to exchange any portion of the securities constituting the trust fund. The court said that it was quite clear from the terms of the trust instrument that the donor retained such a control over the trusts as to make evident an intention on his part that the beneficial enjoyment of the property was not to take effect until after his death. The court further said that in the Matter of Masury the limit was reached beyond which the courts could not go without emasculating the provisions of the transfer tax statute.

"In the matter under consideration there is reserved to the donor a certain comprehensive power not reserved in the deed of trust in the Masury case, namely, the power to amend the deed of trust. This power to amend must necessarily embrace within its signification the power to withdraw any portion of the trust property or to exchange the securities mentioned in the deed of trust for other securities; the power to change the beneficiaries of the trust fund, or the time or the manner in which the income or corpus of the trust fund should be distributed. These additional powers reserved by the grantor over the trust fund appear to bring this matter within the decision in the Matter of Bostwick (*supra*). The application to declare exempt the property constituting the corpus of the trust fund should therefore be denied."

(4) The Schermerhorn case

IN MATTER OF WILLIAM C. SCHERMERHORN, N. Y. Law Journal, June 26, 1913, Surrogate Fowler held: "This is an application to exempt from taxation the corpus of a trust fund passing by virtue of a deed of trust executed by the decedent.

"The deed was executed in 1902. The decedent was at that time a resident of Rhode Island, but the property transferred

by the deed of trust consisted of bonds located in this state. The deed provided that the income from the trust fund be paid to William B. Schermerhorn during his life, and upon his death that the corpus be paid to the grantor, or in the event of the death of the grantor prior to the death of the *cestui que trust* the corpus to be paid to the grantor's next prior of kin in the proportion prescribed by the intestate laws of the State of New York. The grantor reserved to himself the right to alter or modify the deed of trust or to revoke and terminate it.

He died in 1903 without modifying or revoking it. The *cestui que trust* died in December, 1911, and the corpus was then distributed among the grantor's next of kin. They contend that it is not subject to a transfer tax. The transfer tax statute in force at the time the deed of trust was executed provided that a tax should be imposed upon the transfer of property effected by deed or gift intended to take effect in possession or enjoyment at or after the death of the grantor. The corpus of the trust fund created by the deed of trust executed by the grantor could not take effect in the possession or enjoyment of the grantor's next of kin until after his death, because the deed provided that in the event of the death of the *cestui que trust* during the lifetime of the grantor the trust should terminate and the corpus of the trust fund should be paid to the grantor. Therefore the right of the next of kin to the property transferred by the deed of trust did not become absolute until the death of the grantor.

"The reservation of a power of revocation or resettlement to new uses by a settlor of an estate is always his property, and in some cases may amount to a fee simple in the settlor. This is well understood by property lawyers.

"In this matter if the grantor had made an absolute gift of the property and divested himself of all right of ownership in or dominion over it, its transfer would not be subject to a tax, but the fact of his having reserved to himself the right to modify or amend the deed of trust, or to revoke or terminate it, shows that he did not make an absolute gift of the property, and that he could at any time during his life have revoked the gift and recovered possession of the property. Until his death, therefore, there was no completed gift to the remaindermen; and as the transfer to the next of kin could not take effect in possession or enjoyment until after the death of the grantor, the property so transferred is subject to a tax (Matter of Cruger, 54 App.

Div. 405, aff'd 166 N. Y. 602; Matter of Green, 153 N. Y. 223; Matter of Bostwick, 160 N. Y. 489). Application for exemption denied."

(5) The law in existence at the time deed of trust was executed governs

Vide Matter of Keeney, 194 N. Y. 281-287, etiam opinion in same case sub nom. *Keeney v. New York*, 222 U. S. 525-530, *supra*, page 362. Vide etiam Matter of Webber, 151 App. Div. 539-540; Matter of Agnew, N. Y. Law Journal, December 13, 1913, *supra*, page 53.

IN MATTER OF W. WALLACE ATTERBURY, N. Y. Law Journal, March 25, 1913, Surrogate Cohalan said: "This appeal is taken by the State Comptroller from the order assessing a tax upon the decedent's estate. The decedent died on the 6th day of August, 1911. On the 9th day of January, 1904, he executed two deeds of trust, by which he transferred certain personal property to trustees, the income from such property to be paid to him during his life, and upon his death the principal to be paid to certain persons and corporations mentioned in the deeds.

"The appraiser reported that the taxation of the transfer of this property was governed by chapter 732 of the Laws of 1911, the transfer tax statute in force at the date of decedent's death. The State Comptroller contends that the property was transferred when the trust deeds were executed by the decedent, and that its taxation therefore is governed by the statute in existence at that time. If the contention of the State Comptroller is correct, that part of the corpus of the trust fund which was transferred to certain foreign religious corporations would not be exempt from taxation, while the other donees would not be entitled to the exemption of \$1,000 provided by chapter 732 of the Laws of 1911. The deeds of trust were irrevocable. The only restriction upon the power of the trustees was a provision in the deeds by which the trust property could not be sold without the consent of the donor. In every other respect the trustees exercised absolute control over the property.

"The transfer tax statute provides that a tax shall be imposed upon the transfer of property by deed or gift given in contemplation of death, or intended to take effect in possession or enjoyment at or after death. The tax is imposed upon the transfer of the property, and the only question to be determined

in this matter is, Did the transfer of property take effect at the time of the execution of the deeds of trust, or was such transfer deferred until the death of the decedent? The grantor parted with his title to the property at the time the deeds of trust were executed and it became vested in the trustees. Upon the execution of the deeds the donees took a vested remainder in the property subject to the life estate of the donor. Their interests could neither be enlarged nor diminished by the donor after the deeds had been executed. Therefore their right to the property accrued upon the execution of the deeds of trust. It was only their right to possession that was deferred until the death of the grantor.

"As the tax is imposed upon the transfer of the property, or the right to succeed to the property, the law in existence at the time the transfer takes place or the right accrues is the law which governs the taxability of the transfer. Therefore the law in existence at the time the deeds of trust were executed is the law which governs the taxability of the property transferred by virtue of those deeds (Matter of Webber, 151 App. Div. 539; Matter of Haight, 152 App. Div. 228). In the Matter of Green (153 N. Y. 223), relied upon by the respondent, the court decided that the property transferred by a deed of trust was not a gift *inter vivos*, but was a gift intended to take effect in possession or enjoyment at or after death, and therefore taxable under the provisions of the transfer tax statute. The question raised by the present appeal was not before the court in the Matter of Green and that case therefore is not controlling upon this point.

"As the transfer of the property mentioned in the deeds of trust was governed by the Transfer Tax Law in force at the date of the execution of the deeds, the property transferred to the foreign religious corporations is subject to a tax (Matter of Balleis, 144 N. Y. 132), and the other donees are not entitled to the exemption prescribed by chapter 732 of the Laws of 1911. The order fixing tax will be reversed and the appraiser's report remitted to him for correction as indicated."

(6) Property without state when trust deed executed not taxable although within state at grantor's death

IN MATTER OF EDMUND DWIGHT, N. Y. Law Journal, October 8, 1911, affirmed, without opinion, 149 App. Div. 912, it was held that where a deed of trust was executed by a non-

resident, and none of the property constituting the corpus of the trust fund was then located in this State, the transfer of the trust fund is not taxable here although part of it was invested in New York securities at the date of the grantor's death. Surrogate Fowler in his opinion said: "The decedent was a resident of Massachusetts. On September 24, 1894, he executed a deed of trust by which he transferred certain property therein mentioned to a trustee, with directions to pay a certain part of the income to himself during life, and upon his death to pay the income to certain individuals named in the deed; or in the event of the death of either of the said individuals, to pay the principal to their issue, and if they should leave no issue, to pay it to the survivors of certain individuals named therein. When the deed of trust was executed, all of the property constituting the corpus of the trust fund was in the State of Massachusetts, and none of it was actually or constructively in the State of New York. Subsequently to the execution of the deed, but before the death of the decedent herein, the trustee sold a part of the property mentioned in the deed of trust, and with the proceeds purchased certain shares of stock in New York corporations. These shares of stock were held by the trustee at the date of decedent's death and constituted part of the corpus of the trust fund. The appraiser designated to appraise this estate reported the value of these shares of stock held by the trustee in New York corporations as taxable, and from the order entered upon that report the substituted trustees now appeal.

"The transfer tax is a tax imposed upon a particular method of acquisition of property mentioned in the statute; it is not a property tax (*Matter of Vanderbilt*, 172 N. Y. 69; *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283), and the basis of the power to tax is the actual dominion over the subject of taxation at the time the tax is to be imposed or jurisdiction over the person of decedent (*Matter of Swift*, 137 N. Y. 77; *Matter of Hull*, 111 App. Div. 322, *aff'd*, 186 N. Y. 586). At the time the deed of trust was executed by the decedent herein, neither the person of the grantor nor the property mentioned in the deed was within the jurisdiction of the State of New York. The rights of the various individuals mentioned in the deed to any part of the income or to any part of the corpus of the trust fund were derived from the deed of trust and were governed by the provisions of that instrument. They were not created or in any way affected by the laws of this State. It is immaterial whether the

interests of the final beneficiaries were vested or contingent at the time the deed of trust was executed, as any interests to which they are or may be entitled accrued by virtue of the provisions of the deed of trust, and not because of any privilege granted by the State of New York. Therefore, as the transfer of the property constituting the corpus of the trust fund was effected by a deed of trust executed in a foreign State, and as the State of New York had no jurisdiction over the person who executed the deed nor dominion over the property when transferred by that instrument, and as none of the rights of the individuals mentioned in the deed accrued by reason of any privilege granted by the State of New York, this State cannot impose a tax upon such a transfer. Order fixing tax reversed."

(7) Remainder not taxable where trust deed executed prior to enactment of statute

IN MATTER OF JOSEPH HAWES, N. Y. Law Journal, April 8, 1913, Surrogate Fowler held: "The decedent, who was a resident of Massachusetts, died on the 4th day of July, 1911. On the 27th day of April, 1864, he executed a deed of trust by which he conveyed certain property to trustees, the income to be paid to him during his life, and upon his death the principal to be paid to such persons as he should by will direct, but in default of a will to be paid and distributed according to the provisions of the statute regulating the descent and distribution of intestate estates in Massachusetts. At the time of the execution of the deed of trust no part of the property constituting the corpus of the trust fund consisted of property over which the State of New York had jurisdiction.

"Prior to the date of decedent's death the trustees sold part of the trust property and with the proceeds purchased shares of stock in a New York corporation. This stock constituted part of the trust fund at the date of decedent's death, and the transfer tax appraiser reported that it was not subject to a tax in this State. From the order entered upon his report the State Comptroller has taken this appeal. The transfer tax is imposed upon the transfer of property, and the transfer of the corpus of the trust fund after the life estate of the decedent was effected by the deed of trust. The provision in the deed of trust to the effect in the event of the grantor dying intestate the corpus of the trust fund should be paid by the trustees to the persons

who would be entitled to take the property under the intestate laws of Massachusetts, merely provided a means for ascertaining in that contingency the individuals who would take and the amounts which they would receive. The right to take any of the trust fund was determined by the intestate laws, but the transfer of the property was effected by the deed of trust. No administrator was appointed in Massachusetts and the property constituting the trust fund was paid by the trustees to the decedent's niece, who was the only next of kin entitled to receive his property under the terms of the trust deed.

"The property having been transferred by virtue of the provisions of the deed of trust, and the deed having been executed prior to the enactment of our transfer tax statute, the transfer of that part of the property consisting of shares of stock in a New York corporation is not subject to a transfer tax in this State (Matter of Dwight, Surr. Decs., 1911, p. 737, *aff'd*, 149 App. Div. 912; Matter of Smith, 150 App. Div. 805)."

For discussion relative to CONTINGENT REMAINDERS executed before enactment of statute but falling in afterwards vide Matter of Smith, 150 App. Div. 805.

TRUSTEE'S COMMISSIONS

Are allowed as a deduction. Matter of Gihon, 169 N. Y. 443-446; Matter of Shields, 68 Misc. 264-267; Matter of Silliman, 79 App. Div. 98, affirmed, without opinion, 175 N. Y. 513.

For a discussion of trustee's commissions under § 3 of Laws 1887, chap. 713, *supra*, page 415, vide opinion of comptroller, 1 State Department Reports, 585.

UNADMINISTERED ESTATE

It is not necessary to await for an accounting in order to institute transfer tax proceedings. Vide Appraisal.

Interest of a decedent in an unadministered estate of another decedent is subject to tax, but the tax cannot be imposed until the estate is determined. Matter of Clinch, 180 N. Y. 300-303; vide etiam second sentence of § 222; and Matter of Gans, N. Y. Law Journal, April 13, 1912, opinion quoted *post*, page 862.

UNASCERTAINABLE VALUE

Vide Matter of Westurn, 152 N. Y. 93-103, *supra*, page 212; Matter of Emilia C. De Sala, N. Y. Law Journal, July 20, 1912, opinion quoted sub Time of Tax.

UNCONSTITUTIONAL

Vide Constitutionality.

UNITED STATES

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| (1) Transfer to United States is taxable. | (3) Appeal to United States Supreme Court. |
| (2) United States bonds. | (4) United States Supreme Court cases. |

(1) Transfer to United States is taxable

TRANSFER TO UNITED STATES is taxable. Matter of Merriam, 141 N. Y. 479, sustained in 163 U. S. 625, sub nom. United States *v.* Perkins, *supra*, page 183; Matter of Cullum, 76 Hun, 610, affirmed, without opinion, 145 N. Y. 593; People *ex rel.* U. S. A. P. P. Co. *v.* Knight, 174 N. Y. 475-482.

(2) United States bonds

Are taxable in resident estate, but not in non-resident estate.

Prior to the 1892 amendment the transfers of United States bonds were taxable in a resident's estate. Wallace *v.* Myers, 38 Fed. Rep. 184; Matter of Sherman, 153 N. Y. 1-5.

Not so in non-resident's estate even though bonds physically within state at death of non-resident decedent. Matter of Schermerhorn, 50 Misc. 233.

From amendment by chap. 309, Laws 1892, in effect May 1, 1892, to amendment by chap. 88, Laws 1898, in effect March 21, 1898, transfers of United States bonds were held not to be subject to tax. Matter of Whiting, 150 N. Y. 27-31; Matter of Sherman, 153 N. Y. 1; Matter of Coogan, 162 N. Y. 613; Matter of Purdy, 24 Misc. 301.

Taxable since March 21, 1898, in a resident's estate. Matter of Plummer, 161 N. Y. 631, sustained in 178 U. S. 115, sub nom. Plummer *v.* Coler.

In non-resident's estate United States bonds were taxable from said 1898 amendment until amendment by Laws 1911, chap. 732, in effect July 21, 1911, vide, *supra*, page 526, pro-

vided they were physically kept within the state at the time of decedent's death.

Vide Federal Inheritance Tax.

(3) Appeal to United States Supreme Court

UNITED STATES SUPREME COURT; a right under United States constitution must be specially set up and claimed in state courts, as required by § 709 of U. S. Revised Statutes, in order to give jurisdiction. Matter of Houdayer, 150 N. Y. 37, writ of error dismissed in 175 U. S. 32, sub nom. Scudder *v.* Comptroller; Matter of Tilt, 182 N. Y. 557, reversed in 207 U. S. 43, sub nom. Tilt *v.* Kilsey; Matter of Stickney, 185 N. Y. 107, writ of error dismissed in 209 U. S. 419, sub nom. Stickney *v.* Kelsey.

(4) United States Supreme Court cases

Matter of Merriam, 141 N. Y. 479, sustained in 163 U. S. 625, sub nom. United States *v.* Perkins; Matter of Houdayer, 150 N. Y. 37, writ of error dismissed in 175 U. S. 32, sub nom. Scudder *v.* Comptroller; Matter of Plummer, 161 N. Y. 631, sustained in 178 U. S. 115, sub nom. Plummer *v.* Coler; Matter of Dows, 167 N. Y. 227, sustained in 183 U. S. 278, sub nom. Orr *v.* Gilman; Matter of Blackstone, 171 N. Y. 682, sustained in 188 U. S. 189, sub nom. Blackstone *v.* Miller; Matter of Delano, 176 N. Y. 486, sustained in 205 U. S. 466, sub nom. Chanler *v.* Kelsey; Matter of Tilt, 182 N. Y. 557, reversed in 207 U. S. 43, sub nom. Tilt *v.* Kelsey; Matter of Stickney, 185 N. Y. 107, writ of error dismissed in 209 U. S. 419, sub nom. Stickney *v.* Kelsey; Matter of Lord, 186 N. Y. 549, sustained in 211 U. S. 477, sub nom. Beers *v.* Glynn; Matter of Keeney, 194 N. Y. 281, sustained in 222 U. S. 525, sub nom. Keeney *v.* New York; Matter of Tiffany, 202 N. Y. 550, appeal pending.

UNKNOWN NEXT OF KIN

Where the next of kin are unknown the tax is fixed at the highest rate. Matter of Lind, 196 N. Y. 570, *supra*, page 369.

UNLISTED STOCK

Vide Closely Held Stock.

UNRECORDED DEED

Unrecorded deed not delivered by grantor; held, that property subject to tax. Matter of Sharer, 36 Misc. 502; Matter of Jones, 65 id. 121. Vide Gift.

VACATING DECREE

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| (1) Cases in which application granted. | (5) Cases in which application denied. |
| (2) Motion to modify decree. | (6) Matter of Townsend distinguished. |
| (3) Petition. | (7) Resettlement of order. |
| (4) Order amending original order. | |

Section 225 of the Tax Law and subdivision 6 of § 2481 of the Code of Civil Procedure are the provisions which govern the action of the surrogate upon an application to vacate or modify his decree. These provisions are distinct from the remedy of appeal provided for by the first sentence of § 232 (*vide* Appeal), and also from the application to the Supreme Court for a reappraisal under the last paragraph of § 232 (*vide* Reappraisal).

As to REFUND *vide* cases cited sub Refund.

(1) Cases in which application granted

Decree will be vacated where it is "VOID AS HAVING BEEN MADE WITHOUT JURISDICTION." *Matter of Coogan*, 162 N. Y. 613, *supra*, page 239; *Matter of O'Berry*, 179 N. Y. 285, *supra*, page 289; *Matter of Warren*, 62 Misc. 444-446; *Matter of Cameron*, 181 N. Y. 560; *Matter of Scott*, 208 N. Y. 602, *supra*, page 396.

Where both parties mistakenly supposed that the statute, chap. 76, Laws 1899, was constitutional. "The proposition was not litigated nor decided but assumed," and consequently the surrogate may, in his discretion, relieve from consequences of mistake. *Matter of Scrimgeour*, 175 N. Y. 507.

Decree modified "because at most it was A MISTAKE ALL ROUND." *Matter of Backhouse*, 110 App. Div. 737-739, affirmed, without opinion, 185 N. Y. 544.

Where decree taxed a transfer which was exempt under § 221, it being clear that it was "a MUTUAL MISTAKE on the part of the appraiser and the petitioner as to the status and rights of the latter." *Matter of Townsend*, 153 App. Div. 85-89.

May vacate decree "for the purpose of correcting an INADVERTENT ERROR committed by the surrogate under a mistake of fact." *Matter of Earle*, 74 App. Div. 458.

"The appraiser having MADE A MISTAKE of fact in his report as to the taxable value of the interest of one of the legatees, the order fixing tax entered upon this report will be vacated and the report remitted to him for correction, notwithstanding

that the time to appeal from the order has expired." *Matter of Head*, N. Y. Law Journal, December 22, 1911.

Order of surrogate declaring an estate exempt from transfer tax vacated for the reason that it was MADE WITHOUT NOTICE to Comptroller. *Matter of Collins*, 104 App. Div. 184.

Where surrogate had not given NOTICE OF APPRAISAL REQUIRED BY § 231, and it appeared that there had been no laches on the part of the petitioner. *Matter of Daly*, 34 Misc. 148. Time to appeal, however, under § 232 runs from the fixing of tax by surrogate. *Matter of Connelly*, 38 Misc. 466-470.

DOWER was not deducted from value of decedent's real estate, and an application was made to vacate order assessing tax. Surrogate Thomas in *Matter of Weiler*, 122 N. Y. Supp. 608, affirmed, without opinion, 139 App. Div. 905, held that the deduction of the dower interest should have been made because it was not "subject to transfer tax, and in assuming it to be so both parties were in error when the order fixing tax was made.

"The motion to vacate the order and remit the matter to an appraiser for the purpose of correcting this error is granted. *Matter of Scrimgeour*, 175 N. Y. 507, 67 N. E. 1089; *Matter of Coogan*, 162 N. Y. 613, 57 N. E. 1107; *Matter of Silliman*, 175 N. Y. 513, 67 N. E. 1090; *Matter of Willets*, 119 App. Div. 119, 100 N. Y. Supp. 850, 104 N. Y. Supp. 1150, affirmed, 190 N. Y. 527, 83 N. E. 1134."

IN ACTION TO CONSTRUE WILL it was held that certain real estate did not belong to decedent. Thereupon the executor made a motion to modify the order in the transfer tax proceeding which had included said real estate. The motion was granted, and the order of the surrogate was made striking out from the tax assessed the property in question. *Matter of Willets*, 119 App. Div. 119-126, affirmed, without opinion, 190 N. Y. 527.

Decree modified so as to include DEDUCTIONS FOR COMMISSIONS. *Matter of Silliman*, 175 N. Y. 513, *supra*, page 279.

Where "certain NOTES which were owned by the deceased and were held by the executor at the time the transfer tax was fixed, were worthless and uncollectible, which fact was not known to the executor or to the surrogate at the time the tax was fixed, it being believed that the signers of the notes would pay them." *Matter of Sherar*, 25 Misc. 138-139.

Where LEGACIES LAPSED prior to decedent's death, and

original decree taxed transfer as though legacies had not lapsed. *Morgan v. Cowie*, 49 App. Div. 612.

DEBTS PROVEN AGAINST ESTATE AFTER APPRAISAL.

Surrogate Thomas in *Matter of Morgan*, 36 Misc. 753 (1902), refused to modify order affixing tax so as to include claims for deductions which were not urged before the appraiser.

Section 225 held to apply on application for modification of decree for the purpose of including deduction of DEBT OF DECEDENT OVERLOOKED BY EXECUTOR. *Matter of Campbell*, 50 Misc. 485.

Surrogate of Saratoga County refused to modify decree to include deductions for claim rejected by executor but subsequently recovered on, claim not included in original deductions, and further expenses in administering estate. "If, every time a chattel was sold for more or less than the value at which it was appraised or a new debt was discovered, the surrogate could be called upon to make an order modifying his determination, he would have no time for other business." *Matter of Connelly*, 38 Misc. 466-469.

Surrogate of Otsego County in *Matter of Hamilton*, 41 Misc. 268, refused to modify order so as to include debt which had not been discovered at time of appraisal.

The provisions of § 225 are contra to the decision in the *Hamilton* case, *supra*, and to that portion of the decision in the *Connelly* case, *supra*, relating to discovery of new debt. The section provides: "If any debts shall be proven against the estate of a decedent after the payment of any legacy or distributive share thereof, from which any such tax has been deducted or upon which it has been paid by the person entitled to such legacy or distributive share, and such person is required by order of the surrogate having jurisdiction, on notice to the state comptroller, to refund the amount of such debts or any part thereof, an equitable proportion of the tax shall be repaid to him by the executor, administrator or trustee, if the tax has not been paid to the state comptroller or county treasurer; or if such tax has been paid to such state comptroller or county treasurer, such officer shall refund out of the funds in his hands or custody to the credit of such taxes such equitable proportion of the tax, and credit himself with the same in the account required to be rendered by him under this article."

(2) Motion to modify decree

The application to open, vacate or modify a decree must be made to the surrogate having jurisdiction of the estate. Section 225. As to jurisdiction in resident estate vide, page 56, and in non-resident estate, page 137.

The motion should be made on notice. The notice of motion in *Matter of Scott*, 208 N. Y. 602, *supra*, page 396, was as follows:

SURROGATES' COURT, NEW YORK COUNTY.

In the Matter of the Transfer Tax
upon the Estate of
ROBERT SCOTT,
Deceased.

*Notice of Motion under § 2481,
Subd. 6, of Code Civ. Proc.*

SIR: PLEASE TAKE NOTICE that the undersigned will apply to the Surrogate of the County of New York, at the Surrogates' Court to be held in and for the County of New York, on the 9th day of July, 1912, at 10:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order modifying the order fixing tax herein, referred to in the petition hereto annexed, and for such other and further relief as may be proper.

Dated, New York, July 8th, 1912.

Yours, &c.,

WILLIAM P. MALONEY,

Attorney for Administrators.

To THOMAS E. RUSH, Esq.,

Attorney for State Comptroller.

(3) Petition

The petition should set forth fully the facts upon which petitioner bases his claim that the decree should be modified or vacated. What the allegations should be vary with the nature of the relief sought and the circumstances of each particular case. The petition in the *Scott* case, *supra*, affords an example of the method of presenting the facts to the surrogate.

SURROGATES' COURT, NEW YORK COUNTY.

In the Matter of the Transfer
Tax upon the Estate of
ROBERT SCOTT,
Deceased.

Petition.

TO THE SURROGATES' COURT OF THE COUNTY OF NEW YORK:

The petition of William P. Maloney respectfully shows:

That your petitioner resides at No. 1 West 69th Street, Borough of

Manhattan, City, County and State of New York. That he is attorney for the administrators of the above-named decedent's estate, to wit: Robert A. Scott and William Scott, and as such has had full charge of all the affairs of the estate and is fully acquainted with and has full knowledge of the facts herein set forth.

Upon information and belief:

That Robert Scott, the above-named decedent, died a resident of the State of New York on July 24th, 1910, intestate and thereafter and on August 8th, 1910, Letters of Administration were duly issued by this Court to Robert A. Scott and William Scott.

Thereafter and in regular course a transfer tax proceeding was had herein and Headley M. Greene, Esq., filed his report in the office of this Court on September 27th, 1910, and his supplemental report in the office of this Court on September 1st, 1911, wherein he reported the value of the taxable property belonging to the above-named decedent, being the sum of \$129,402.41, all of which said property the said appraiser reported, passed, under the decedent's will, to the decedent's brother, William Scott.

That thereafter and on the 21st day of September, 1911, an order was made by Mr. Surrogate Fowler and entered on that day in the office of this Court, wherein the amount of tax, as computed upon the taxable value of decedent's property, was inadvertently and erroneously fixed in the sum of \$2,632.07, whereas the correct, accurate and true amount of said tax should be the sum of \$2,382.07, computed as follows:

	Tax.
\$ 25,000.00 @ 1%.....	\$ 250.00
100,000.00 @ 2%.....	2,000.00
4,402.41 @ 3%.....	132.07
	<hr/>
Total tax.....	\$2,382.07

That said tax as fixed by the order of September 21st, 1911, is excessive in amount and erroneously computed as hereinbefore alleged, and your petitioner respectfully prays this Court to redress the wrong done, by amending the order fixing tax by changing the amount of tax, as assessed therein, from the sum of \$2,632.07 to the sum of \$2,382.07 and for such other and further relief as to the Court may seem just and equitable.

Dated, New York, July 8th, 1912.

WM. P. MALONEY,
Petitioner.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

WILLIAM P. MALONEY, being duly sworn, deposes and says: That he is the petitioner herein and is acquainted with the facts in this pro-

ceeding; that he has read the foregoing petition and knows the contents thereof, and that the same is true to his own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes the same to be true.

WM. P. MALONEY.

Sworn to before me, this

8th day of July, 1912.

OTTO A. GILLIG,

Notary Public,

New York County.

(4) Order amending original order

The order granted upon this petition was affirmed by the Court of Appeals, and was as follows:

At a Surrogates' Court held in and for the County of New York, at the Hall of Records, Borough of Manhattan, City of New York, on the 9th day of August, 1912.

Present: HON. JOHN P. COHALAN, *Surrogate*.

<p>In the Matter of the Transfer Tax upon the Estate of ROBERT SCOTT, Deceased.</p>	}	<p><i>Order.</i></p>
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On reading and filing the petition of William P. Maloney verified on July 8th, 1912, wherein it appears that the transfer tax as assessed upon the estate of the above named decedent was erroneously computed, and due notice of this application and motion having been given to Thomas E. Rush, Esq., Attorney for the State Comptroller.

Now on motion of Henry A. Miller, Esq., Attorney for the petitioner herein, Thomas E. Rush, Esq., appearing in opposition thereto, it is

ORDERED, that the order fixing tax heretofore made and entered herein on the 21st day of September, 1911, be and the same hereby is amended so as to read as follows: Ordered and Adjudged that the cash value of the property referred to in the Appraiser's report filed herein, the transfer of which is subject to the tax imposed by the act in relation to taxable transfers of property and the tax to which said transfers are liable is as follows:

Beneficiary.	Cash Value of Interest.	Tax Assessed Thereon.
William Scott, brother	\$129,402.41	\$2,382.07

JOHN P. COHALAN,
Surrogate.

(5) Cases in which application denied

APPLICATION DENIED BY REASON OF LAPSE OF TIME. *Matter of Hoople*, 179 N. Y. 308, *supra*, page 290; *Matter of Buckingham*, 106 App. Div. 13-17; *Matter of Von Post*, 35 Misc. 367.

Surrogate's decree fixing VALUE OF REAL PROPERTY not modified because property subsequently sells for a less sum. *Matter of Lowry*, 89 App. Div. 226; *Matter of Barnum*, 129 App. Div. 418; *Matter of Meyer*, 209 N. Y. 386, *supra*, page 397.

Held, that surrogate has not power to set aside previous decree, not appealed from, which assessed certain securities. *Matter of Schermerhorn*, 38 App. Div. 350; *Matter of Fulton*, 30 Misc. 70.

ELECTION to treat property as taxable prevents subsequent application to vacate decree. *Matter of Mather*, 179 N. Y. 526, *supra*, page 295.

FRAUDULENTLY CONCEALED ASSETS. In *Matter of Arza C. Peck*, N. Y. Law Journal, January 12, 1911, affirmed, without opinion, 149 App. Div. 912, Surrogate Cohalan held: "The affidavit submitted by the attorney for the State Comptroller does not clearly and satisfactorily show that the executor fraudulently concealed from the appraiser certain assets of the estate, and in the absence of such convincing evidence the court will not vacate its order entered more than four years ago (*Matter of Barnum*, 129 App. Div. 418; *Matter of Lowry*, 89 App. Div. 226; *Deagan v. King*, 83 App. Div. 428)."

Surrogate Cohalan, in *Matter of Badger*, N. Y. Law Journal, June 8, 1912, refused to vacate order fixing tax which had not followed the RULE IN THE PORTER CASE (67 Misc. 19, affirmed, without opinion, 148 App. Div. 896), the time to appeal having expired. He said: "The appraiser deducted from the New York assets the commissions allowed by the laws of this State, but he refused to make any deductions for the administration expenses incurred outside of the State. On the 7th day of December, 1910, an order fixing tax was duly entered upon his report, and no appeal was taken from the order. Whether the expense incurred in the administration of the estate outside of this State should be deducted from the New York assets in the proportion which the New York assets bore to the entire assets of the estate was a question of law, and the appraiser's refusal to make the deduction, together with the order of the court entered upon his report, constituted a determination that the estate was not entitled to have such a deduction made. If this deter-

mination was erroneous, the remedy of the administrator was by appeal, as prescribed in § 232 of the Tax Law. No appeal having been taken from the order, this application must be denied. (Matter of Lowry, 89 App. Div. 226; Matter of Bar-num, 129 App. Div. 418; Matter of Monteith, 27 Misc. 163.)"

WHERE PROPERTY IS BROUGHT TO THE ATTENTION OF THE APPRAISER and he has held it not subject to tax, and the time to appeal from order of surrogate confirming report has expired, the surrogate has no power to cause another appraisal although the property was erroneously declared exempt. *Matter of Crerar*, 56 App. Div. 479.

AN ERROR OF LAW should be corrected by appeal. *Matter of Niven*, 29 Misc. 550.

Valuation of BUSINESS OF DECEDENT having been assessed at figure given by executor, an application to vacate decree and for a new appraisal was denied. *Matter of Wallace*, 28 Misc. 603.

Decree of surrogate not appealed from is an adjudication upon the liability of transfers to taxation, is final and "a complete bar to the maintenance of any subsequent proceeding by the DISTRICT ATTORNEY to collect a tax." *Matter of Wolfe*, 137 N. Y. 205-214.

Adjudication of surrogate in a transfer tax proceeding is "binding upon the question of taxation only." *Amherst College v. Ritch*, 151 N. Y. 282-343.

(6) Matter of Townsend distinguished

IN MATTER OF VAN NEST, N. Y. Law Journal, November 8, 1913, an application was made to vacate the order fixing tax and to remit the appraiser's report to him for correction. In denying the application Surrogate Cohalan said:

"The decedent, who was a resident of Indiana, died on the 17th of April, 1907. An appraiser was duly designated by this court to appraise his estate for the purpose of the transfer tax. The administratrix of the estate filed an affidavit with the appraiser alleging that the only property of which the decedent died possessed in this State was ten shares of stock of the AMERICAN EXPRESS COMPANY and that the value of this stock was \$1,900. The appraiser found the value of the stock to be \$2,000, and an order assessing a tax upon the estate was entered on November 23, 1910.

"No appeal was taken from the order. About eighteen months after the entry of the order this application to vacate

the order and to remit the report to the appraiser was made, and upon the return day the matter was placed upon the Reserved Calendar. Subsequently and on July 11, 1912, the question involved in this application came before this court in the **MATTER OF LITCHFIELD** (Surr. Decs., 1912, p. 734) and it was there held that the valuation of the stock by the appraiser at its full value and entry of the order upon his report constituted a determination which could be reviewed only upon an appeal, and that as no appeal was taken within the time prescribed by statute the application should be denied. The decision in that matter is controlling in this, unless the decision in the **Matter of Townsend** (153 App. Div. 85), decided subsequently to the **Matter of Litchfield**, can be construed as extending the principle there enunciated to the facts in the **Matter of Litchfield**.

"In the **Matter of Townsend** there was no evidence submitted to the appraiser upon which he could make a determination as to the taxability of the bequest to the New York Exchange for Women's Work. The court therefore held that the mistake could be corrected after the time to appeal from the order had expired. In the matter under consideration the evidence as to the value of the stock was submitted to the appraiser, and upon such evidence he made a finding that the value of the stock was \$200 a share. Such determination upon evidence duly presented distinguishes this matter from the **Matter of Townsend**."

(7) Resettlement of order

A MOTION FOR RESETTLEMENT of the ordered entered upon the decision sustaining the appeal under the first sentence of § 232 in **Matter of Francis**, *supra*, page 749, was denied by Surrogate Cohalan in **Matter of Francis**, N. Y. Law Journal, November 26, 1913, the surrogate saying: "The proposed order contains a provision directing that the appraiser's report be remitted to him for further testimony. As the papers do not contain an allegation that material evidence has been discovered since the appeal was argued which, if submitted to the court, might affect its decision, the application is denied."

"The surrogate's order denying the motion to resettle his first order is not appealable." **Matter of Sondheim**, 69 App. Div. 5.

VALUE

The subject of valuation of the assets of a **RESIDENT** dece-

dent is discussed under the schedules of assets *supra*, page 96. Of a NON-RESIDENT Estate, *supra*, page 133.

Vide Annuities; Cash Value; Closely Held Stock; Good Will; Life Estate.

Value by which the tax is to be measured is the value of the estate at the time of the transfer of title, and not its value at the time of the transfer of possession. Matter of Vassar, 127 N. Y. 1-8; Matter of Davis, 149 N. Y. 539-547.

Surrogate Ketcham in Matter of Van Pelt, 63 Misc. 616, said: "No doubt, for the purpose of the transfer tax, the estate must be valued as of the time of death; but whether each executor shall receive a full commission is to be determined by the value of the estate which they shall have administered."

VESTED ESTATE

"A tax cannot be imposed upon a right to the succession where the right accrued prior to the existence of the statute." Matter of Jonathan Smith, 150 App. Div. 805-807, and cases therein cited. Vide Remainders.

As to tax under subdivision 6 of § 220 upon exercise of power of appointment derived from a disposition of property made prior to the statute, vide Matter of Vanderbilt, 50 App. Div. 246, affirmed, on opinion below, 163 N. Y. 597; Matter of Delano, 176 N. Y. 486, sustained in 205 U. S. 466, sub nom. Chanler *v.* Kelsey, *supra*, page 280. Vide Power of Appointment.

VOTING

In questions of disputed residence of decedent the voting place where decedent last voted becomes material. For affidavit re residence vide page 140.

WATER RATES

Vide Taxes.

WEARING APPAREL

Wearing apparel of ordinary kind, vide page 105.

Laces, shawls, furs and the like, vide page 108.

WHAT LAW GOVERNS

Rights of the parties governed by the statute in existence at the time of the transfer; procedure by the statute in force at the time the proceedings are taken. Matter of Abraham, 151 App. Div. 441, and cases cited, *supra*, page 54.

As to when death occurs on same day upon which statute is passed, vide *Matter of Dreyfous*, 18 N. Y. Supp. 767; *Matter of Lane*, 157 App. Div. 694-697, *supra*, page 809.

Vide *Matter of Agnew*, N. Y. Law Journal, December 13, 1913, *supra*, page 53, as to transfers by trust deed.

WHEN TAX ACCRUES

Vide *Time of Tax*. For discussion of the taxable transfer vide page 32.

WIDOW

Vide *Dower*; *Tenants by the Entirety*; *Wife*.

WIFE

Vide *Dower*; *Tenants by the Entirety*.

Entitled to five thousand dollars exemption and the minimum rates of subdivision 1 of § 221a; *supra*, page 45.

WIFE OF A SON also entitled to said exemption and rates.

WIDOW OF AN ADOPTED SON is within the meaning of the words "widow of a son" in subdivision 1 of § 221a. *Matter of Duryea*, 128 App. Div. 205.

Where articles enumerated in § 2713 of Code of Civil Procedure do not in fact exist as part of decedent's estate, deductions to an amount equivalent to the assumed value of such articles should not be made. *Matter of Libolt*, 102 App. Div. 29; *Matter of Stiles*, 64 Misc. 658-662. As to right of widow when the ownership of decedent is not sole, vide *Matter of Hallenbeck*, 195 N. Y. 143.

WIDOW'S QUARANTINE under § 204 of Real Property Law would appear to be a proper deduction. *Matter of Stiles*, *supra*. Said section 204 reads: "A widow may remain in the chief house of her husband forty days after his death, whether her dower is sooner assigned to her or not, without being liable to any rent for the same; and in the meantime she may have her reasonable sustenance out of the estate of her husband."

Husband of decedent was a member of a firm, and instead of withdrawing his profits he invested them with his firm, there being a special account of the same kept. He transferred this account to his wife, and it continued in her name until after death. Held, that the account was part of the wife's estate and taxable. *Matter of Anthony*, 40 Misc. 497.

WILL

A transfer by will is subject to the tax. Section 220; *Matter of Gould*, 156 N. Y. 423; *Matter of Rogers*, 71 App. Div. 461-465, affirmed, on opinion below, 172 N. Y. 617; etiam *Matter of Edson*, 38 App. Div. 19-22, affirmed, on opinion below, 159 N. Y. 568.

The construction of wills is necessary in transfer tax proceedings, *Matter of Peters*, 69 App. Div. 465, and cases cited, *supra*, page 599.

WITHDRAWAL OF OBJECTIONS TO PROBATE

Vide *Matter of Cook*, 187 N. Y. 253-255-259, and cases cited sub *Compromise of Claim*.

WITNESS

The "appraiser is authorized to issue subpoenas and to compel the attendance of witnesses before him and to take the evidence of such witnesses under oath." Second paragraph of § 230. Vide cases cited sub *Contempt* and sub *Testimony*.

WOMEN'S CHRISTIAN TEMPERANCE UNION

Exempt as educational under first sentence § 221. *Matter of Field*, 147 App. Div. 927, affirming 71 Misc. 396.

WORKS OF ART

Vide § 221*b supra*, page 43 as to when exempt.

Works of art should be set forth in Schedule A³ with title and name of artist, and appraisal by expert should be furnished, vide *supra*, page 107.

WORTHLESS SECURITIES OR CLAIMS

Corporate securities should be set forth in Schedule A⁴, *supra*, page 112, and other securities in Schedule A³, page 109.

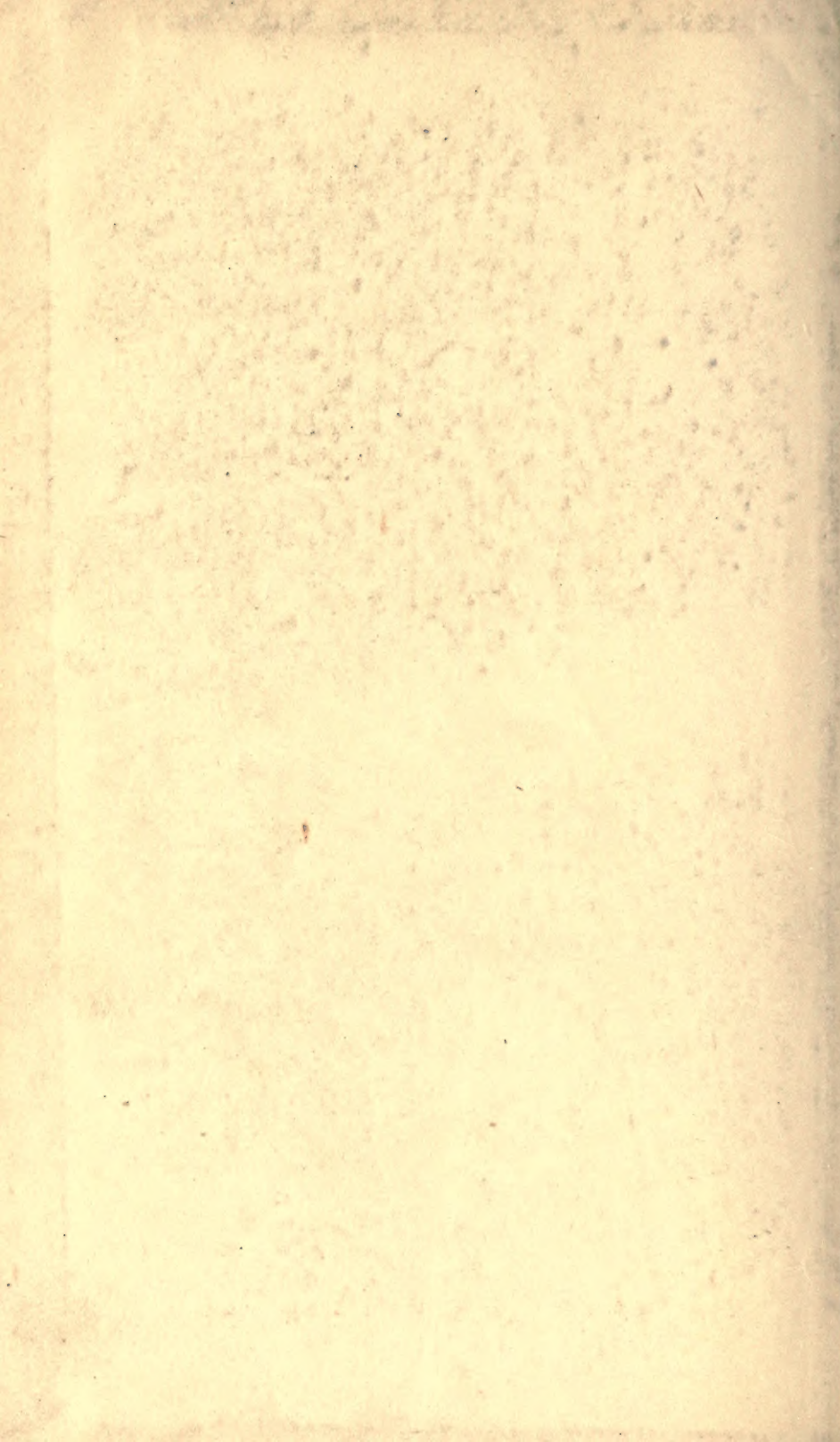
Even though the securities are worthless in the opinion of executor or administrator they should be included in the schedules. State upon what facts you base your conclusion that the securities are worthless.

The same situation exists as to claims, vide page 109. As to debt forgiven by will where beneficiary is insolvent vide

Matter of Manning, 169 N. Y. 449, *supra*, page 258; Morgan *v.* Warner, 162 N. Y. 612, *supra*, page 230.

YOUNG MEN'S CHRISTIAN ASSOCIATION

Held to be an educational corporation within the meaning and intendment of the first sentence of § 221. Matter of Moses, 138 App. Div. 525-528.



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